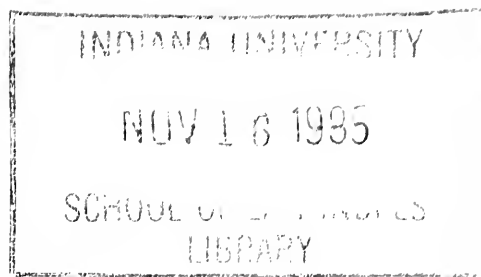






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# Indiana Law Review



Volume 17 No. 1 1984

## 1983 Survey of Recent Developments in Indiana Law

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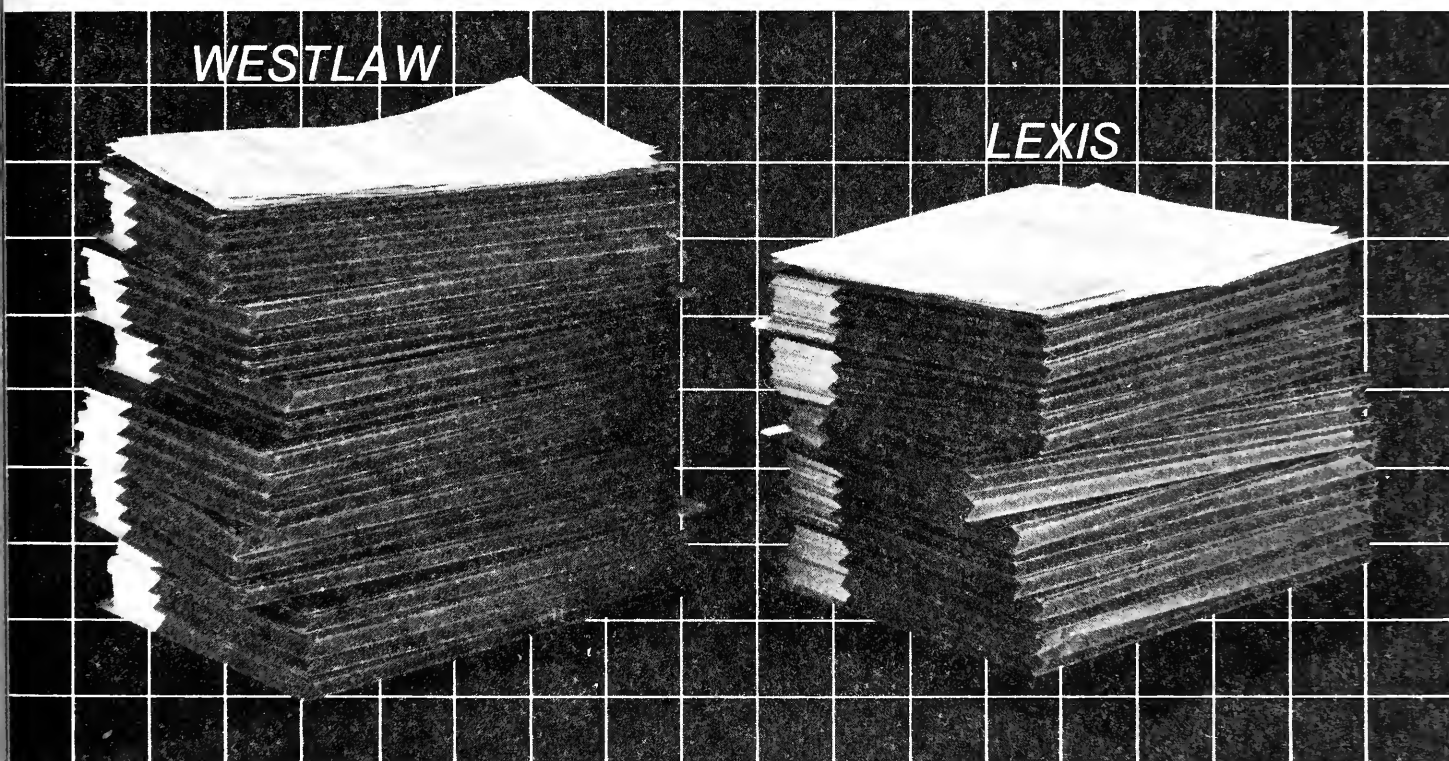
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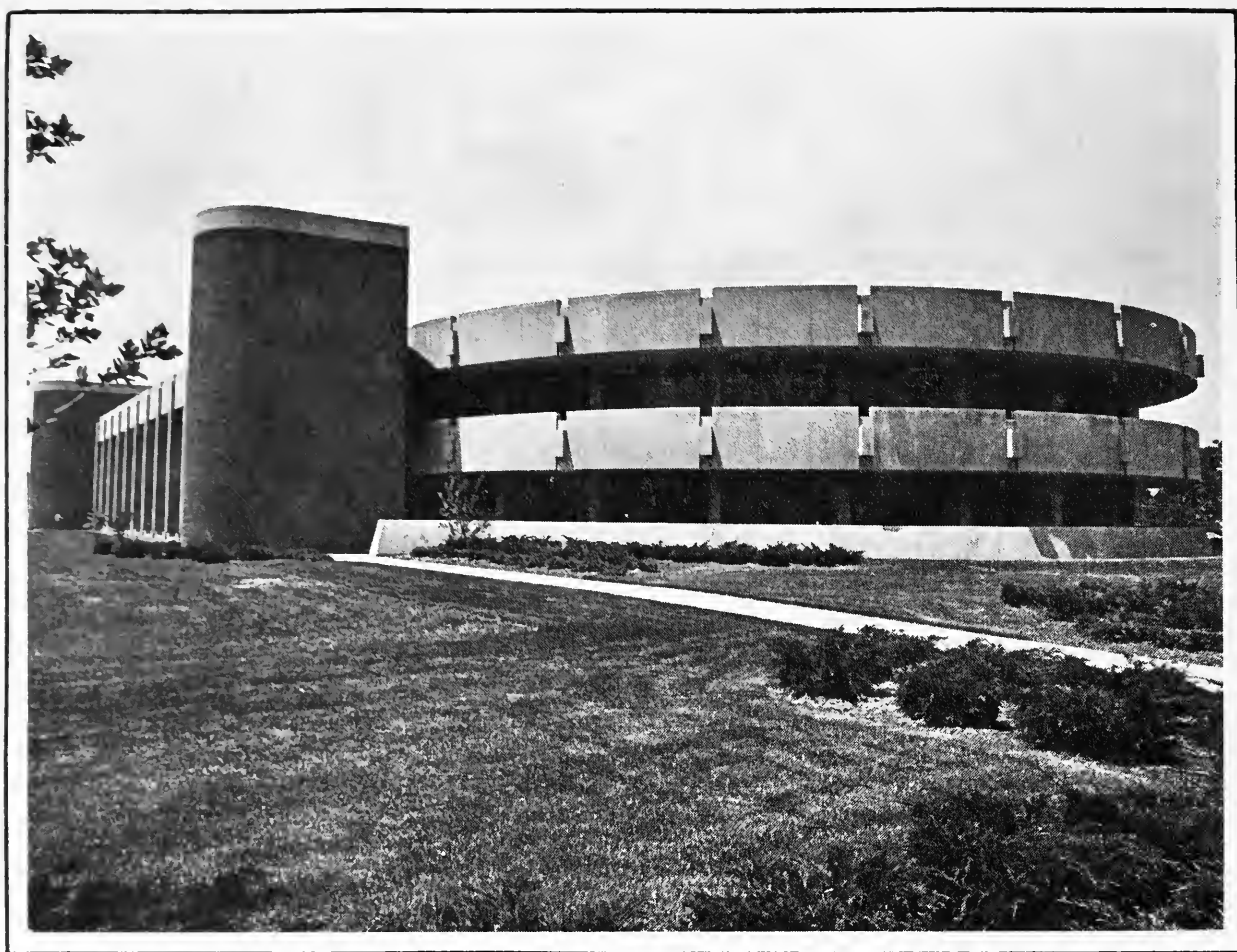


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## Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eleventh annual Survey of Recent Developments in Indiana Law. This survey covers the period from May 1, 1982, through May 1, 1983. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

### I. Administrative Law

R. GEORGE WRIGHT\*

#### A. Notice, Hearings, and Eldridge Balancing

1. *Notice of Right to Counsel.*—In *Berzins v. Review Board of the Indiana Employment Security Division*,<sup>1</sup> the Indiana Supreme Court authoritatively resolved the division of Indiana appellate authority noted in last year's Survey Article<sup>2</sup> respecting an unemployment compensation claimant's right to notice of her right to counsel.

The court held first that "due process does require some form of procedure reasonably calculated to provide notice to employers and claimants of the right to be represented at evidentiary hearings conducted by the Employment Security Division."<sup>3</sup> The court went on to hold, however, that the failure to notify a claimant of her right to representation by counsel requires a remand only if the claimant is able to make a sufficient showing of prejudice stemming from such lack of notice.<sup>4</sup>

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<sup>1</sup>439 N.E.2d 1121 (Ind. 1982).

<sup>2</sup>Smith, *Administrative Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 1, 6-8 (1983).

<sup>3</sup>439 N.E.2d at 1123.

<sup>4</sup>*Id.* at 1127.

With respect to the first holding, the court's ultimate authority was the balancing test mandated by the well-known Supreme Court case of *Mathews v. Eldridge*.<sup>5</sup> *Eldridge*, it will be recalled, weighs the benefits of additional procedural safeguards with respect to an administrative hearing against the additional costs incurred, through balancing

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, along with the probable value, if any, of additional or substitute procedural safeguards, and;
- (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>6</sup>

The court's conclusion that due process, as determined by an *Eldridge* balancing, requires at least some form of notice of a claimant's right to counsel dictated the partial overruling<sup>7</sup> of the prior Indiana case of *Walker v. Review Board of the Indiana Employment Security Division*.<sup>8</sup>

On the issue of whether a showing of prejudice from lack of such notice is necessary to mandate reversal, though, the court did not choose to re-apply the *Eldridge* test. Instead, the court determined that

if the hearing referee fulfills his duty and effectuates a complete presentation of the case, . . . there is no need to remand the cause to the Employment Security Division and impose on that agency the time-consuming exercise of another hearing. The harmless error doctrine . . . has its place in judicial review of administrative proceedings.<sup>9</sup>

From this point, the court concluded that the due process fairness of administrative evidentiary hearings "inherently requires a case-by-case assessment."<sup>10</sup>

The court thus opted for a case-by-case prejudice rule, as opposed to a per se error standard, in its approach to instances of lack of notice of a right to counsel. While this approach is almost demonstrably the less satisfactory of the two, candor requires the admission that contrary authority not addressed by the court in *Berzins* is sparse.<sup>11</sup>

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<sup>5</sup>424 U.S. 319 (1976).

<sup>6</sup>*Wilson v. Review Bd. of the Ind. Employment Sec. Div.*, 270 Ind. 302, 309-10, 385 N.E.2d 438, 444 (Ind. 1979) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>7</sup>See 439 N.E.2d at 1123.

<sup>8</sup>404 N.E.2d 1363 (Ind. Ct. App. 1980).

<sup>9</sup>439 N.E.2d at 1127.

<sup>10</sup>*Id.*

<sup>11</sup>Several social security disability benefit cases are of some value in evaluating the court's rationale in *Berzins*. See, e.g., *Echevarria v. Secretary of HHS*, 685 F.2d 751 (2d Cir. 1982); *Thompson v. Schweiker*, 665 F.2d 936 (9th Cir. 1982); *Ware v. Schweiker*, 651 F.2d 408 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); *Rials v. Califano*, 520 F. Supp.

The court's adoption of a case-by-case prejudice rule, with its concomitant rejection of a per se error standard, is instead inconsistent with principles of fairness and the economic conservation of judicial resources. There is no reason in logic or law not to apply the *Eldridge* balancing test factors<sup>12</sup> to determine the most commendable judicial response to a deprivation of due process through lack of appropriate notice.

Whether the *Eldridge* test is deemed technically applicable or not, it remains true that requiring a remand for rehearing in any case involving a lack of appropriate notice would obviate the substantial chance of an erroneous determination of lack of prejudice or of ineligibility for benefits, and would be virtually costless with respect to judicial and administrative time.

The obvious administrative response to an announced per se error rule would be to ensure that in each case, the claimant at a minimum is sent a comprehensible written notice, along with other appropriate forms, indicating the scope of the claimant's rights to representation, including the possibility of free counsel. A per se error rule undeniably establishes the strongest appropriate incentives for hearing referees to prevent the question of the optimal judicial response to a due process violation from arising in the first place.

Moreover, a case-by-case prejudice rule will result in at least occasional instances in which prejudice to the claimant passes undetected on review, even if whole record review is utilized, no matter what test for prejudice is eventually adopted. While certain sorts of prejudice, such as a missing hearsay objection, may be apparent from the record, no record can disclose, for example, that an uncounseled claimant mistakenly believed that revealing his chronic alcoholism would hurt his case.<sup>13</sup>

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786 (E.D. Tex. 1981); see also Meyerhoff & Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974); Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

The majority of relevant foreign jurisdictional cases apparently are from Pennsylvania. See, e.g., *Unemployment Compensation Bd. of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631 (1981); *Linke v. Commonwealth*, 450 A.2d 312 (Pa. Commw. Ct. 1982); *Snow v. Commonwealth*, 61 Pa. Commw. 396, 433 A.2d 922 (1981); *Robinson v. Commonwealth*, 60 Pa. Commw. 275, 431 A.2d 378 (1981); *Hoffman v. Commonwealth*, 60 Pa. Commw. 108, 430 A.2d 1036 (1981); *Katz v. Commonwealth*, 59 Pa. Commw. 427, 430 A.2d 354 (1981).

Subsequent Indiana cases in other contexts that are at least arguably inconsistent with the tenor of *Berzins* would include *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982) (paternity case); *In re Turner*, 439 N.E.2d 201 (Ind. Ct. App. 1982) (civil commitment proceeding).

<sup>12</sup>See *supra* note 6 and accompanying text.

<sup>13</sup>Compare *Sotak v. Review Bd. of the Ind. Employment Sec. Div.*, 422 N.E.2d 445, 448 (Ind. Ct. App. 1981) with *Foster v. Review Bd. of the Ind. Employment Sec. Div.*, 413 N.E.2d 618, 621 (Ind. Ct. App. 1980), following remand, 421 N.E.2d 744 (Ind. Ct. App. 1981). See also *Flick v. Review Bd. of the Ind. Employment Sec. Div.*, 433 N.E.2d 84, 87 (Ind. Ct. App. 1982).

Finally, it should be noted that a *per se* error standard, by requiring notice of right to counsel in every instance, logically tends to generate a higher percentage of attorney-assisted claimants. Perhaps the most important implication of this result is reduced role conflict for the hearing referee, who otherwise is unnecessarily pushed to extremes in his conflicting roles of being a neutral, detached arbiter on the one hand, and of actively ensuring a complete presentation of the case on the other hand.<sup>14</sup>

2. *Post-Deprivation Hearings.*—In *City of Indianapolis v. Tabak*,<sup>15</sup> the court of appeals was confronted with a close question of *Eldridge*<sup>16</sup> balancing in determining that the trial court abused its discretion in granting a preliminary injunction against the city controller's suspension of the plaintiff's secondhand goods dealer's license.

In this case, the plaintiff had been arrested for several license-related crimes, including attempt to receive stolen property and failure to keep proper records. As a result, the city controller suspended the plaintiff's license. The plaintiff, however, was able to obtain a temporary restraining order and preliminary injunction against the suspension.

In view of the multifaceted nature of the *Eldridge* balancing test, and the subtlety of some of the determinations required, reference to incontestably controlling precedent is typically impossible. In this case, for example, arrest is not the same as conviction,<sup>17</sup> and secondhand goods dealing is not as highly regulated, or as closely tied to legal and illegal gambling, as the training of race horses.<sup>18</sup>

On the other hand, the loss of business revenue does not, despite the right to a post-suspension hearing within ten days, seem as grievous or as potentially health jeopardizing as the disconnection of utilities for disputed or unpaid bills despite the right to a post-disconnection hearing.<sup>19</sup>

It is at least arguable that the court of appeals might have avoided the difficulties inherent in such a balancing process by accepting the argument that the trial court did not abuse its discretion in enjoining the suspension. The Indianapolis city code provides for license suspension without a hearing when the licensee is accused of "an offense involving his fitness to hold a license and an emergency exists."<sup>20</sup> At trial, the controller had testified that he believed an emergency existed because the plaintiff had been charged with several license-related crimes.<sup>21</sup>

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<sup>14</sup>See 640 IND. ADMIN. CODE § 1-11-3 (1979). See also, in the social security disability context, *Echevarria v. Secretary of HHS*, 685 F.2d 751, 755-56 (2d Cir. 1982); *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981), quoted in *Smith v. Schweiker*, 677 F.2d 826, 829 (11th Cir. 1982).

<sup>15</sup>441 N.E.2d 494 (Ind. Ct. App. 1982).

<sup>16</sup>See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

<sup>17</sup>See *Bell v. Burson*, 402 U.S. 535 (1971).

<sup>18</sup>See *Barry v. Barchi*, 443 U.S. 55 (1979).

<sup>19</sup>See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-20 (1978).

<sup>20</sup>441 N.E.2d at 495-96 (quoting CODE OF INDIANAPOLIS AND MARION COUNTY INDIANA § 17-49(b) (1975)).

<sup>21</sup>441 N.E.2d at 496.

To find an emergency in a stolen goods case, as opposed, say, to a case involving the purveying of contaminated foods, is to announce that one will nearly always find an emergency, and that the apparently distinct requirements of a crime reflecting on fitness and an emergency are in fact one, with the latter "requirement" of an emergency having no independent force or meaning. In ordinary language, "crime" and "emergency" are sufficiently distinct so as to lead one to presume the city to have intended at least partially distinct meanings. *Tabak* effectively repeals the "emergency" provision.

### B. Due Process and Academic Dismissal

*Neel v. I.U. Board of Trustees*<sup>22</sup> required the reconciliation, in the context of an academic dismissal from a state-supported dental school, of traditional considerations of university autonomy and faculty discretion, with equally well established principles of the common law of contracts.

This case involved the trial court's denial of the plaintiff's request for a permanent injunction requiring his reinstatement as a dental student in good standing. The plaintiff's expulsion stemmed essentially from excessive unexcused absences from lecture and clinical classes.

On appeal, the court rejected the plaintiff's due process claim on the strength of *Board of Curators v. Horowitz*,<sup>23</sup> in which the Supreme Court distinguished between academic and disciplinary or conduct-based dismissals and imposed only minimal due process requirements with respect to the former.<sup>24</sup> In *Neel*, the court determined that a dismissal of the academic sort was involved, despite evidence that the plaintiff's failure to attend classes was psychologically rooted.<sup>25</sup>

The thrust of the plaintiff's contract argument focused on certain explicit provisions of the officially promulgated dental school *Bulletin*, in which an apparently exhaustive set of criteria for dismissal were listed, none of which applied to the plaintiff.<sup>26</sup> The school relied on a separate provision under which unexcused absences from clinics brought forth a dubiously graduated progression of sanctions featuring a pronounced gap between the sanctions for the second absence ("a discussion with the Dean") and the third ("dismissal").<sup>27</sup>

The plaintiff's arguments that he had insufficient notice of the school's reliance on the latter provision and that the school in any event failed to comply literally with its own stated unexcused absence policies were unsuccessful at trial and on appeal. The court on appeal held that in the

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<sup>22</sup>435 N.E.2d 607 (Ind. Ct. App. 1982).

<sup>23</sup>435 U.S. 78 (1978).

<sup>24</sup>*Id.* at 89-90.

<sup>25</sup>435 N.E.2d at 610.

<sup>26</sup>*Id.* at 611.

<sup>27</sup>*Id.*

absence of a showing of arbitrariness or unfairness, the expert application of academic or professional standards could override any necessity for the school to adhere to its own internal rules with literal precision.<sup>28</sup>

It is submitted that there is no necessity for the courts readily to accommodate apparent, or at least colorable, material breaches of contract by university administrations. The *Horowitz* case makes clear that the due process hearing requirements in the case of academic dismissals will be minimal.<sup>29</sup> Due process does not require elaborate, exhaustive specifications in advance of every circumstance under which a professional school may dismiss a student. A generalized prior public statement, reasonably and impartially applied, will suffice. There is thus no need for a school to inadvertently restrict its own disciplinary options through its published bulletin, only to circumvent those self-imposed explicit restrictions through a magisterial exercise of expert academic or professional discretion.

While more advanced educational institutions doubtless require the exercise of less readily reviewable discretion, it is also clear that the relationship between a graduate student and his university more nearly approaches the pure contract model than that between the elementary school student and his school. To the extent that the relationship between student and administration is contractual, the reasonable expectations of the parties should govern that relationship.<sup>30</sup> It lies within the discretion of the school administration to largely control the extent of its contractual obligations through its drafting of school bulletins, handbooks, and other materials.

### C. Scope of Local Government Discretion

1. *Designation of Urban Development Areas.*—In a case of potential importance, the court of appeals in *St. Joseph Medical Building Associates v. City of Fort Wayne*<sup>31</sup> considered the denial by the Fort

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<sup>28</sup>*Id.* at 612.

<sup>29</sup>See 435 U.S. at 85-86.

<sup>30</sup>See, e.g., *Giles v. Howard Univ.*, 428 F. Supp. 603, 605 (D.D.C. 1977). The court on appeal in *Neel* took note of the *Giles* case, but applied the *Giles* "reasonable expectations" test not to interpreting the bulletin or contract in question, but more generally to the practical position of the parties. While the plaintiff might not have reasonably expected dismissal under the contract, he should, in the court's estimation, have reasonably apprehended the likelihood of his dismissal on "equitable" grounds, his contract rights aside. 435 N.E.2d at 612-13. More restrictive, and more defensible, interpretations of the *Giles* "reasonable expectations" test may be found in *Pride v. Howard Univ.*, 384 A.2d 31, 36 n.7 (D.C. 1978) and in *Marquez v. University of Washington*, 32 Wash. App. 302, 306, 648 P.2d 94, 97 (1982), cert. denied 103 S. Ct. 1253 (1983). See also *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979), rev'd on other grounds, 661 F.2d 756 (9th Cir. 1981); *Zumbrun v. University of S. Cal.*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); *Basch v. George Washington Univ.*, 370 A.2d 1364, 1366-68 (D.C. 1977); *Maas v. Corporation of Gonzaga Univ.*, 27 Wash. App. 397, 400, 618 P.2d 106, 108 (1980).

<sup>31</sup>434 N.E.2d 130 (Ind. Ct. App. 1982).



Wayne Common Council of appellant's application to have a certain tract of its real estate designated as an "urban development area."<sup>32</sup>

The point of such a designation would be to encourage the development of otherwise unpromising properties or areas through the provision of property tax relief benefits to private developers. In this instance, the Fort Wayne Common Council denied such designation, at least in part on the basis of its recently adopted policy that such applications should be filed prior to the issuance of the necessary building permits.<sup>33</sup>

On appeal, the court affirmed the trial court's grant of summary judgment against the developers based largely on the consideration that the statute governing these matters<sup>34</sup> was said to grant legislative discretion in this respect to the council.<sup>35</sup> As the statute in question uses the permissive "may," as opposed to mandatory language, the appellant's enforceable rights were minimal. The court concluded that "it does not matter whether the council relied upon one reason or many, or whether its reasons were laudable or not. Its exercise of its discretion is not a matter for substantive review."<sup>36</sup>

Judge Staton, in dissent, was troubled by what he viewed as a judicial conferral of essentially unreviewable discretion to local councils to grant or withhold substantial tax deductions.<sup>37</sup> Judge Staton instead emphasized language in the urban development area statute apparently mandating the council's adherence to specified decision procedures required under separate provisions of the Indiana Code.<sup>38</sup>

It is apparent, though, that the statutes and their successors alluded to by Judge Staton were less than artfully drafted if it was their purpose, and the legislature's intention, to effectively rein in the discretion of the common council. The statutes focus on the case of an affirmative finding of eligibility for redevelopment and the appropriate procedures for such a finding,<sup>39</sup> rather than the denial of eligibility as in the case at bar. Procedures for denying eligibility are neither explicitly nor implicitly provided. Despite references to exceptions, "supporting data," notice, and evidentiary hearings, the statutes would be seriously overread if found to effec-

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<sup>32</sup>See IND. CODE §§ 6-1.1-12.1-1 to -6 (1982).

<sup>33</sup>See 434 N.E.2d at 133 n.3.

<sup>34</sup>IND. CODE § 6-1.1-12.1-2 (1982). New statutory standards and terminology in this respect were imposed by the 1983 session of the general assembly. See IND. CODE § 6-1.1-12.1-2.5 (Supp. 1983).

<sup>35</sup>434 N.E.2d at 133.

<sup>36</sup>*Id.* at 134.

<sup>37</sup>*Id.* (Staton, J., dissenting).

<sup>38</sup>See IND. CODE §§ 18-7-7-12 to -14 (1976) (current version at IND. CODE §§ 36-7-14-15 to -17 (1982)). For a generally useful discussion in the redevelopment context of permissive as opposed to mandatory statutory language, the relationship between state and municipal authority, and the ascertainment of legislative intent, the reader's attention is directed to *Campbell v. First Baptist Church*, 298 N.C. 476, 259 S.E.2d 558 (1979).

<sup>39</sup>See IND. CODE §§ 18-7-7-12 to -14 (1976) (current version at IND. CODE §§ 36-7-14-15 to -17 (1982)).

tively limit the discretion of the local council to deny urban development area status, along with the consequent tax advantages.

2. *Reimbursement of Hospital Expenses.*—The relationship between state and local authority was also explored in *Welborn Memorial Baptist Hospital, Inc. v. County Department of Public Welfare*.<sup>40</sup> In this case, the county limited its reimbursement to the hospital for expenses incurred in treating emergency cases involving alcoholism, drug addiction, or emotional disorder to only the first five to seven days of hospitalization. The county prevailed at trial, and on appeal cited the press of fiscal necessity, as well as implicit authority granted by the legislature, in establishing this reimbursement limitation policy.<sup>41</sup>

The court of appeals reversed, holding that under the applicable prior statutes,<sup>42</sup> the county's obligation to reimburse the hospital for the costs of care of eligible indigents, once the determination of eligibility had been made, was not subject to restriction or limitation by county department of public welfare policy.<sup>43</sup>

While the statutes in question are not as explicit on this point as the hospital may have maintained, there is certainly prior dicta that the court could have cited, suggesting that the county's obligation to reimburse is not subject to limitation as a matter of county policy.<sup>44</sup> Despite the need to exert reasonable control over the otherwise largely unpredictable and uncontrollable potential liability of the county departments of public welfare in this respect, it is difficult to read the statutes as conferring upon local governmental units carte blanche to restrict their reimbursements on any reasonable basis they choose to adopt.

Actually, this issue would pose a closer question under the current statute.<sup>45</sup> This statute provides in part that "[a] resident of Indiana who meets the income and resource standards established by the state department of public welfare . . . is eligible for assistance to pay for *any part of the cost* of the treatment of a disease . . . ."<sup>46</sup> An opinion consistent

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<sup>40</sup>442 N.E.2d 372 (Ind. Ct. App. 1982). Other hospital assistance cases decided during the survey period are of diminished importance in light of statutory amendments. These cases would include *DeKalb County Welfare Bd. v. Lower*, 444 N.E.2d 884 (Ind. Ct. App. 1983) (see IND. CODE § 12-5-6-3 (1982)); *Marion County Dep't of Pub. Welfare v. Methodist Hosp.*, 436 N.E.2d 123 (Ind. Ct. App. 1982) (see IND. CODE § 12-5-6-11 (1982)); *County Dep't of Pub. Welfare v. Baker*, 434 N.E.2d 958 (Ind. Ct. App. 1982) (see IND. CODE § 12-5-6-2 (1982); 470 IND. ADMIN. CODE § 11-1-1 (Supp. 1983)).

<sup>41</sup>442 N.E.2d at 373.

<sup>42</sup>IND. CODE §§ 12-5-1-1 to -17 (1976) (repealed 1981) (current version at IND. CODE §§ 12-5-6-1 to -11 (1982)).

<sup>43</sup>442 N.E.2d at 373.

<sup>44</sup>See *Marion County Dep't of Pub. Welfare v. Methodist Hosp.*, 436 N.E.2d 123, 125-26 (Ind. Ct. App. 1982); see also *Lutheran Hosp. v. Department of Pub. Welfare*, 397 N.E.2d 638, 644 (Ind. Ct. App. 1979).

<sup>45</sup>IND. CODE §§ 12-5-6-1 to -11 (1982).

<sup>46</sup>*Id.* § 12-5-6-2(a) (1982) (emphasis added). Section 12-5-6-11, cited by the court in *Welborn*, 442 N.E.2d at 373 n.2, applies only to counties in which a health and hospital

with *Welborn* would in some instances treat the emphasized language as surplusage.

#### D. Rulemaking versus Adjudication

*Indiana Air Pollution Control Board v. City of Richmond*<sup>47</sup> presented a difficult problem of rulemaking versus adjudication and an associated problem of standing. In this case, on the basis of a hearing of somewhat indeterminate scope, the Indiana Air Pollution Control Board sought to promulgate a final ruling classifying Wayne Township of Wayne County as a "nonattainment" area with respect to permissible levels of airborne pollutants.<sup>48</sup> This determination, or rule, would have jeopardized, but not necessarily foreclosed, EPA approval of any new pollutant emission sources.<sup>49</sup>

The City of Richmond filed its complaint in an effort to prevent final promulgation of the "rule" in question. The board's motion to dismiss on the grounds that the City lacked standing to challenge the properly promulgated rule was denied, and the trial court ultimately held that the "nonattainment" classification of Wayne Township was actually a case of adjudication,<sup>50</sup> with the attendant strict notice and hearing procedure requirements imposed by the Indiana Administrative Adjudication Act.<sup>51</sup> On appeal, the court reversed.

The appellate court attempted to resolve this issue first by turning to the legislative definitions of the terms in question.<sup>52</sup> A definitional stand-off resulted, because while a rule does not include an adjudication, and an adjudication may involve an administrative hearing of "issues or cases applicable to particular parties,"<sup>53</sup> a rule may take the form of a "classification . . . having the effect of law."<sup>54</sup> The court then cited several federal authorities for the proposition that the non-attainment classifica-

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corporation exists, i.e., to Marion County only. See *Marion County Dep't of Pub. Welfare v. Methodist Hosp.*, 436 N.E.2d 123, 124 (Ind. Ct. App. 1982).

<sup>47</sup>443 N.E.2d 1262 (Ind. Ct. App. 1983), *vacated*, No. 1283 S 472 (Ind. Dec. 30, 1983). A choice between rulemaking and adjudicative procedures on review by the state board of tax commissioners was authorized in *Board of School Comm'rs v. Eakin*, 444 N.E.2d 1197, 1202 (Ind. 1983).

<sup>48</sup>443 N.E.2d at 1263.

<sup>49</sup>*Id.* at 1264 n.5.

<sup>50</sup>*Id.* at 1263.

<sup>51</sup>See IND. CODE § 4-22-1-5 to -8 (1982). For a brief discussion of the difference between rulemaking and adjudication with respect to resolution of controverted issues, see *Indiana Sugars, Inc. v. Interstate Commerce Comm'n*, 694 F.2d 1098, 1100 (7th Cir. 1982).

<sup>52</sup>See IND. CODE § 4-22-2-3 (1982).

<sup>53</sup>*Id.* § 4-22-2-3(d).

<sup>54</sup>*Id.* § 4-22-2-3(b). This definitional statute was also referred to in *Jones v. Blinziner*, 536 F. Supp. 1181 (N.D. Ind. 1982). In this case, three Indiana Department of Public Welfare implementation letters were asserted by the plaintiff class to amount to rules under Indiana Code section 4-22-2-3(b), not properly subjected to notice and comment procedures under section 4-22-2-4. The court determined that the implementation letters in question were not

tion is a "rule" under the federal APA,<sup>55</sup> while acknowledging both the greater breadth of the federal definition and the absence in its authorities of any squarely posed issue of rulemaking versus adjudication.<sup>56</sup>

In light of the recognition that chasing some abstract distinction between rules and adjudications tends to degenerate into a rather scholastic endeavor, the courts should be encouraged to resolve issues of rulemaking versus adjudication on a pragmatic basis, with the practical costs and benefits of rulemaking as opposed to adjudication being determinative in close cases.

Professor Davis rightly observes that "the same function may be rulemaking for one purpose or in one context and adjudication for another purpose or in another context."<sup>57</sup> In deciding which approach is required in a close case, the court should weigh not only such rather academic considerations as the forward-looking or retrospective approach of the agency, but also more significant factors such as the number of parties practically concerned, the financial stakes involved, the likely benefits of

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required in order to interpret federal Public Law 97-35, subsequently codified at 42 U.S.C. § 602(a)(18), as the federal statute in question required no interpretation.

In light of the fact that the court in *Jones* devoted several columns to interpreting this statute in the course of rejecting the interpretation of the department of public welfare, and that the implementation letters could also be construed as rules implementing the federal statute in question, there is certainly a case to be made for viewing such letters as rules under section 4-22-2-3(b). While the implementation letters might have been viewed not as rules, but as internal directives without the force of law, it is quite possible that the need for *Jones* might have been avoided entirely if the department's implementation letters had been treated as rules from the beginning and subjected to appropriate notice and comment procedures.

*Jones* is also noteworthy for requiring the state department of public welfare to include its calculations or other means to enable AFDC claimants to check the department's non-eligibility determinations, to notify claimants that Medicaid benefits will be terminated if the claimant is terminated from the AFDC program, and for determining that "state standard of need" in 42 U.S.C. § 602(a)(18) refers to total calculated needs, as opposed to adjusted or ratably reduced needs. See 6 Ind. Reg. 912, 913-14 (1983) (amending 470 IND. ADMIN. CODE § 10-5-1 (Supp. 1983)).

<sup>55</sup>5 U.S.C. § 551(4) (1976).

<sup>56</sup>443 N.E.2d at 1264 n.4. Not cited in the court's opinion is *PPG Industries, Inc. v. Costle*, 630 F.2d 462 (6th Cir. 1980) in which the court, though still in dicta, at least poses the alternatives more self-consciously. The court in *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973), was confronted with Anaconda's request for an adjudicatory hearing and injunction against the EPA's promulgation of a proposed rule governing sulfur dioxide emissions in a particular county in Montana. The district court in this cause had found an adjudicatory proceeding, with right of cross-examination, to be required in light of Anaconda's status as the sole target of the "rule" and the contested status of the relevant "adjudicative facts." *Anaconda Co. v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972). On appeal, the Tenth Circuit reversed, finding no due process violation and no explicit requirement in the text of the Clean Air Act for hearings "on the record." 482 F.2d at 1306. For argument for a more liberal approach to imposing hearing requirements beyond those explicitly mandated by the statute, see *Utah Int'l, Inc. v. Department of Interior*, 553 F. Supp. 872, 881 (D. Utah 1982).

<sup>57</sup>2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2, at 5 (2d ed. 1979).

trial-type safeguards and procedures, the cost or delay entailed by adjudication, and the ability to effectively carry out agency policy if adjudication is to be required in this and like instances.

In *City of Richmond*, the concern over adjudication versus rulemaking was largely pointed toward resolving whether the City had standing to challenge the result of the administrative proceeding.<sup>58</sup> Because the doctrine of standing is recognized as largely prudential in any event,<sup>59</sup> there is a case to be made for determining the issue of the City's standing first and independently, and then proceeding, if necessary, to tackle the rulemaking versus adjudication issue on this basis.

### E. Whole Record versus Favorable Evidence Review

This survey period produced the anticipated batch of largely reconcilable pronouncements on the propriety of whole record review as opposed to review based only on evidence favorable to the judgment.

There is a superficial consensus that on direct appellate court review of unemployment compensation determinations, favorable evidence review will be employed. This consensus was reinforced during the past survey period by *Skrundz v. Review Board of the Indiana Employment Security Division*,<sup>60</sup> *City of Indianapolis v. Review Board of the Indiana Employment Security Division*,<sup>61</sup> and *Ryba v. Review Board of the Indiana Employment Security Division*.<sup>62</sup>

Even among these cases, there is arguably enough variance in the precise language employed by the courts for the practitioner to appreciate one more than another, depending on the facts of her case. The court in *Skrundz*, for example, indicated that "findings of the Board are conclusive unless reasonable men, considering only evidence supporting those findings, would be bound to reach a different conclusion."<sup>63</sup> *City of Indianapolis* determined that "[w]e may only consider the evidence, together with its reasonable inferences, most favorable to the Review Board's decision."<sup>64</sup> *Ryba* stated that the court "looks only to the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom."<sup>65</sup>

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<sup>58</sup>See 443 N.E.2d at 1265 n.7.

<sup>59</sup>See *id.* at 1265; see also *Minority Police Officers Ass'n v. South Bend*, 555 F. Supp. 921, 929 (N.D. Ind. 1983); *Jones v. Blinziner*, 536 F. Supp. 1181, 1191 (N.D. Ind. 1982).

<sup>60</sup>444 N.E.2d 1217 (Ind. Ct. App. 1983).

<sup>61</sup>441 N.E.2d 36 (Ind. Ct. App. 1982).

<sup>62</sup>435 N.E.2d 78 (Ind. Ct. App. 1982).

<sup>63</sup>444 N.E.2d at 1220 (citing *Marozsan v. Review Bd. of the Ind. Employment Sec. Div.*, 429 N.E.2d 986 (Ind. Ct. App. 1982); *Jean v. Review Bd. of the Ind. Employment Sec. Div.*, 429 N.E.2d 4 (Ind. Ct. App. 1981)).

<sup>64</sup>441 N.E.2d at 37 (citing *Skirvin v. Review Bd. of the Ind. Employment Sec. Div.*, 171 Ind. App. 139, 355 N.E.2d 425 (1976)).

<sup>65</sup>435 N.E.2d at 81.

It therefore remains for the practitioner to determine whether, in a given case, she can draw some effective distinction between evidence supporting a finding and evidence supporting a decision or judgment, whether inferences from the evidence of record are permissible grounds of judgment, and even whether there may be some difference between evidence favorable to a judgment and evidence "most favorable" to a judgment.

The practitioner who remains dissatisfied with the favorable evidence standard—and who may indeed be wondering why the courts of appeal systematically apply their most restrictive scope of review precisely where no intervening trial court decision has reviewed the administrative determination—may perhaps find a sympathetic hearing for an argument that, for example, a search for prejudice stemming from a procedural error makes no sense if such a search is confined to the evidence supporting the decision appealed from.<sup>66</sup>

Ultimately, what may be least satisfactory about a favorable evidence standard is not that, literally applied, it would virtually ensure affirmance, but that evidence favorable to a finding or judgment may be inseparable from, or susceptible of meaningful evaluation only in the context of, evidence not so favorable. Perhaps the standard persists because of its usefulness in steeling the court's resolve not to reweigh the evidence on appeal.<sup>67</sup>

In the matter of direct review by trial courts of determinations by the Indiana Public Service Commission, it is whole record review that is well entrenched, despite the absence of any explicit statutory mandate.<sup>68</sup> During this survey period, this consensus was reinforced by *AFL-CIO, Central Labor Council v. Southern Indiana Gas & Electric Co.*,<sup>69</sup> *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.*,<sup>70</sup> and *State Employees' Appeals Commission v. Brown*.<sup>71</sup>

When a trial court reviews a determination by an Indiana zoning appeals board, the court of appeals has, in contrast, indicated that "the trial court reviews the evidence and inferences supporting the Board's

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<sup>66</sup>Prejudice hunts have been conducted most recently in the unemployment compensation cases of *Berzins v. Review Bd. of the Ind. Employment Sec. Div.*, 439 N.E.2d 1121 (Ind. 1982); *Flick v. Review Bd. of the Ind. Employment Sec. Div.*, 443 N.E.2d 84 (Ind. Ct. App. 1982); *Ryba v. Review Bd. of the Ind. Employment Sec. Div.*, 435 N.E.2d 78 (Ind. Ct. App. 1982).

<sup>67</sup>Note that in each one of the principal cases, the court explicitly stated that it was not its function to weigh or reweigh the evidence. See *Skrundz*, 444 N.E.2d at 1220; *City of Indpls.*, 441 N.E.2d at 37; *Ryba*, 435 N.E.2d at 81.

<sup>68</sup>See *State Employees' Appeals Comm'n v. Brown*, 436 N.E.2d 321, 330 (Ind. Ct. App. 1982) (citing *City of Evansville v. Southern Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562 (1975); IND. CODE § 8-1-3-1 (1982)).

<sup>69</sup>443 N.E.2d 1243, 1247 (Ind. Ct. App. 1983).

<sup>70</sup>440 N.E.2d 14, 17 (Ind. Ct. App. 1982).

<sup>71</sup>436 N.E.2d 321, 330 (Ind. Ct. App. 1982).

decision.”<sup>72</sup> This view was supported by *Martin County Nursing Center, Inc. v. Medco Centers, Inc.*,<sup>73</sup> which urged that “[a] trial court . . . must look at the evidence most favorable to the party who prevailed in the administrative proceeding,”<sup>74</sup> but which also observed that “the trial court must examine the whole record to determine whether an agency’s decision lacks a reasonably sound basis of evidentiary support.”<sup>75</sup> A certain flexibility in the scope of review in such instances thus remains.

A final development during this survey period on the scope of review, and certainly not the least significant, was the supreme court’s declaration that in its appellate review of workers’ compensation claim determinations by the Indiana Industrial Board, “we may consider only that evidence which tends to support its determination, *together with any uncontradicted adverse evidence*.”<sup>76</sup> Counsel may wish to argue that the supreme court has intended to establish a hybrid, middle-ground scope of review standard to be broadly applied, or, in contrast, that the supreme court has intended by implication to preclude the marshaling of inferences from evidence to support administrative determinations.

#### *F. Specificity and Comprehensiveness of Required Findings of Fact and Statements of Reasons*

During the past survey period, the Indiana courts of appeal extended and refined recent expositions of what may be required in the way of

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<sup>72</sup>*Porter County Plan Comm’n v. Burns Harbor Estates*, 437 N.E.2d 1053, 1055 (Ind. Ct. App. 1982).

<sup>73</sup>441 N.E.2d 964 (Ind. Ct. App. 1982).

<sup>74</sup>*Id.* at 968 (citing *Indiana Civil Rights Comm’n v. Holman*, 177 Ind. App. 648, 380 N.E.2d 1281 (1978)).

<sup>75</sup>441 N.E.2d at 967 (citing *Natural Resources Comm’n v. Sullivan*, 428 N.E.2d 92 (Ind. Ct. App. 1981)).

<sup>76</sup>*Talas v. Correct Piping Co.*, 435 N.E.2d 22, 26 (Ind. 1982) (emphasis added).

For the period of this survey, the most interesting federal pronouncements on the scope and standard of appellate review of administrative decisions are found in *Indiana Sugars, Inc. v. Interstate Commerce Comm’n*, 694 F.2d 1098 (7th Cir. 1982). This case explores the arcane balancing tests imposed in the case of non-deregulated rail line abandonment proceedings, in which the public’s interest is held as an article of faith to lie with non-abandonment of even unprofitable lines. *See id.* at 1100.

The court of appeals in *Indiana Sugars* began by essentially equating for their present purposes the “arbitrary and capricious” and substantial evidence tests. *Id.* In reversing the Commission’s decision, the court then provided a graphic illustration of the thinness of the line between vigorous “arbitrary and capricious” review and reweighing the evidence on appeal. The court determined that the commission should have focused “greater attention upon the serious need for rail service by the shipper,” and that the commission’s decision was in other respects “extremely unpersuasive,” “speculative,” and unconvincing. *Id.* at 1101. Rightly or wrongly, in *Indiana Sugars* the Seventh Circuit essentially treated substantial evidence review as requiring substantial evidence persuasive to the court on review. *See id.*



administrative findings of fact<sup>77</sup> and statements of agency reasoning processes<sup>78</sup> in decisionmaking.

In *Charles W. Cole & Son, Inc. v. Indiana & Michigan Electric Co.*,<sup>79</sup> the court of appeals had indicated that once a certain threshold level of subject matter complexity and quantity of evidence is exceeded, intelligent appellate court review of administrative determinations requires not only statements of agency findings and conclusions, but also a statement of reasons for the agency's decision, a statement of the law thought applicable by the agency, relevant policy considerations, and "an explanation of the processes followed" by the agency in arriving at its decision.<sup>80</sup>

While a complex utility case might be the prototypical instance in which these requirements would be imposed, the court of appeals within the past survey period indicated that statements of reasons and of reasoning, or of the linkage between findings of basic and of ultimate fact, may be necessary outside the context of Public Service Commission decisions.<sup>81</sup> Counsel appealing administrative decisions of some complexity, therefore, may wish to examine not only the adequacy of the agency's findings of fact and conclusions of law, but also the degree to which the former is determinative of the latter.

A second theme of *Cole* taken up within the past survey period is that the "quantity and complexity of the evidence introduced" will, in part, determine "what degree of specificity is required of basic findings."<sup>82</sup> While this language from *Cole* was cited almost verbatim during the past survey period,<sup>83</sup> the implication is presumably not that relatively simple cases require only generalized, vague statements of basic facts found, and conversely, but that the degree of complexity of a given case should be

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<sup>77</sup>See *Perez v. United States Steel Corp.*, 428 N.E.2d 212 (Ind. 1981); *Talas v. Correct Piping Co.*, 426 N.E.2d 26 (Ind. 1981). It is unclear whether the court of appeals retains jurisdiction when it remands for further findings of fact. *Compare* *Hidden Valley Lake Property Owners Ass'n v. HVL Utils., Inc.*, 441 N.E.2d 1388, 1389 (Ind. Ct. App. 1982) (jurisdiction should be retained to ensure compliance) *with* *Pierce Governor Co. v. Review Bd. of the Ind. Employment Sec. Div.*, 435 N.E.2d 274, 276 (Ind. Ct. App. 1982) (jurisdiction not retained since clear directions were given to the agency).

<sup>78</sup>*Charles W. Cole & Son, Inc. v. Indiana & Michigan Elec. Co.*, 426 N.E.2d 1349 (Ind. Ct. App. 1981).

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 1353.

<sup>81</sup>See *State Employees' Appeals Comm'n v. Brown*, 436 N.E.2d 321, 331 (Ind. Ct. App. 1982) (citing the same underlying authority, *V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc.*, 171 Ind. App. 109, 355 N.E.2d 441 (1976), as is relied upon in *Cole*, 426 N.E.2d at 1353-54)).

<sup>82</sup>426 N.E.2d at 1353.

<sup>83</sup>See *Indiana Bell Tel. Co. v. T.A.S.I., Inc.*, 433 N.E.2d 1195, 1200 (Ind. Ct. App. 1982); *cf.* *ATS Mobile Tel. Inc. v. Northwestern Bell Tel. Co.*, 330 N.W.2d 123, 129 (Neb. 1983) (sufficient evidence to deny mobile telephone service license); *see also* *Mobilfone of Northeastern Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 40 Pa. Commw. 181, 397 A.2d 35 (1979) (sufficient evidence of need and capacity).

reflected in the lengthiness and sheer magnitude of the findings of basic fact.

The Indiana Supreme Court determined in *Perez v. United States Steel Corp.*<sup>84</sup> that the appellant from an administrative determination has "a legal right to know the evidentiary bases upon which the ultimate finding rests."<sup>85</sup> Two cases from the past survey period, however, indicate that while an appellant may have a right to a finding on every disputed material issue, or on every possible theory of recovery, the court on appeal may look to implications from the explicit findings, or to documents aside from those denominated as findings of fact, in order to supply the necessary findings.

In *Sloan v. Review Board of the Indiana Employment Security Division*,<sup>86</sup> the unemployment compensation claimant-appellant asserted on appeal, in essence, that a finding of a breach on the part of the claimant of a duty reasonably owed did not substitute for a finding of the reasonableness of the duty in question. The court of appeals disagreed, noting that the former implies, or necessarily entails, the latter.<sup>87</sup> While this is doubtless true as a matter of logic, it would seem that a requirement, within practical limits, of separate findings as to breach of duty and of the reasonableness of the duty in question would tend to better ensure their separate consideration by the agency. There may be more that is logically implied in an explicit finding than that which the fact finder has consciously weighed.

In the case of *Hardesty v. Bolerjack*,<sup>88</sup> the court of appeals upheld the trial court's affirmance of the decision of the county sheriff's merit board to discharge the officer-appellant. The court approved what amounted to the incorporation into the findings of various reasonably detailed written allegations lodged against the appellant.<sup>89</sup> In finding the existence of the violations as charged, the board was said to find, by

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<sup>84</sup>426 N.E.2d 29 (Ind. 1981).

<sup>85</sup>*Id.* at 32. See *Office of Util. Consumer Counselor v. Indiana Cities Water Corp.*, 440 N.E.2d 14, 17 (Ind. Ct. App. 1982); *Sosa v. Review Bd. of the Ind. Employment Sec. Div.*, 433 N.E.2d 29, 30 (Ind. Ct. App. 1982) ("[T]he findings of fact must exclude every possibility of recovery."); *Jones v. Review Bd. of the Ind. Employment Sec. Div.*, 405 N.E.2d 601, 604-05 (Ind. Ct. App. 1980); *Wolfe v. Review Bd. of the Ind. Employment Sec. Div.*, 176 Ind. App. 287, 291-92, 375 N.E.2d 652, 655-56 (1978).

<sup>86</sup>444 N.E.2d 862 (Ind. Ct. App. 1983).

<sup>87</sup>*Id.* at 865. Missing explicit findings were supplied by inference as well in *City of Frankfort v. FERC*, 678 F.2d 699, 707 (7th Cir. 1982). In contrast, no supportive inferences were drawn in *Trigg v. Review Bd. of the Ind. Employment Sec. Div.*, 445 N.E.2d 1010 (Ind. Ct. App. 1983), in which the court on appeal reversed and remanded a denial of unemployment compensation benefits where there was no finding that the work rule allegedly violated by the claimant was uniformly enforced, even where the board might have found discharge for just cause under other statutory definitions of just cause. See IND. CODE § 22-4-15-1(e) (1982).

<sup>88</sup>440 N.E.2d 490 (Ind. Ct. App. 1982).

<sup>89</sup>*Id.* at 494.

necessary implication, the required facts constituting or underlying each alleged violation.<sup>90</sup> Intelligent review on appeal was therefore said to be possible.

This procedure provoked a dissent from Judge Staton,<sup>91</sup> who argued that a reiteration of even detailed charges was inconsistent with the mandate of *Perez* and could not reveal the board's method or reasons for its resolution "of the relevant sub-issues and factual disputes."<sup>92</sup>

It is possible for a charging document to be so elaborate, specific, and detailed in its pleading and analysis of the evidence to be adduced, that if it were conscientiously incorporated into a set of findings of fact and conclusions of law, intelligent appellate review would be possible. To encourage the unnecessary extension of this procedure, though, is to encourage impressionistic administrative decisionmaking and ineffective judicial review.

### G. *The Liberal Construction of Remedial Statutes*

It is well established in Indiana that social legislation such as the Employment Security Act should be construed liberally in favor of the claimant in order to accomplish the legislation's social purposes.<sup>93</sup> The actual weight attributed to this policy varies according to context, and several cases decided within the past survey period explored the force and limitations of this policy.

In *City of Indianapolis v. Review Board of the Indiana Employment Security Division*,<sup>94</sup> the policy of liberal interpretation of the Employment Security Act in the claimant's favor came into play in the appellate court's determination that the claimant was entitled to unemployment compensation benefits, despite his resignation, by virtue of the medically substantiated health-related nature of his departure.<sup>95</sup>

The same policy provided guidance to the court on appeal in *Potts v. Review Board of the Indiana Employment Security Division*.<sup>96</sup> In *Potts*, the court determined that the board had acted contrary to law in allocating

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<sup>90</sup>*Id.* at 493-94. The court noted that because the Industrial Board and the Employment Securities Division do not use charging documents as a Merit Board does, the incorporation-by-reference procedure approved here would not be possible in workers' compensation or unemployment cases. *Id.* at 494.

<sup>91</sup>*Id.* at 494-95 (Staton, J., dissenting).

<sup>92</sup>*Id.* at 495 (quoting *Perez v. United States Steel Corp.*, 426 N.E.2d 29, 33 (Ind. 1982)).

<sup>93</sup>See, e.g., *City of Indianapolis v. Review Bd. of the Ind. Employment Sec. Div.*, 441 N.E.2d 36, 39 (Ind. Ct. App. 1982); *Potts v. Review Bd. of the Ind. Employment Sec. Div.*, 438 N.E.2d 1012, 1016 (Ind. Ct. App. 1982); *Bowen v. Review Bd. of the Ind. Employment Sec. Div.*, 173 Ind. App. 166, 168, 362 N.E.2d 1178, 1179 (1977); *Hacker v. Review Bd. of the Ind. Employment Sec. Div.*, 149 Ind. App. 223, 231, 271 N.E.2d 191, 195 (1971); *Schakel v. Review Bd. of the Ind. Employment Sec. Div.*, 142 Ind. App. 475, 478, 235 N.E.2d 497, 500 (1968).

<sup>94</sup>441 N.E.2d 36 (Ind. Ct. App. 1982).

<sup>95</sup>*Id.* at 39.

<sup>96</sup>438 N.E.2d 1012 (Ind. Ct. App. 1982).

vacation pay wage credits to the week paid rather than the week the vacation occurred, thus leaving the claimants without sufficient wage earnings to qualify for the quarter in which their vacation occurred.<sup>97</sup>

The policy of liberal construction, however, was of little efficacy in *Smith v. Review Board of the Indiana Employment Security Division*.<sup>98</sup> The claimant's petition for judicial review had been dismissed as untimely in view of her failure to file notice of her intention to appeal within fifteen days of the mailing of the adverse decision. What lent special interest to this appeal were the circumstances of a week's delay, due to the logistics of mail delivery, in the claimant's receipt of the board's decision, and the claimant's mailing of her notice of appeal by certified mail, return receipt requested, on the last day of the statutory appeal period.<sup>99</sup> Justice Hunter's reasonable recommendation that this unnecessary trap for the unwary be statutorily overturned<sup>100</sup> was not acted upon by the past session of the Indiana legislature.

The liberal construction policy was also without effect, though apparently applicable, in *Frost v. Review Board of the Indiana Employment Security Division*.<sup>101</sup> *Frost* centered on the proper interpretation of an Indiana statute<sup>102</sup> relevant to the issue of the state's right to recoup certain unemployment compensation benefits paid to the recipient following her discharge from employment for which the recipient later received an arbitration award.

On appeal, the court upheld the review board's determination "that the retroactive wages paid pursuant to an order of the grievance arbitrator were the legal equivalent of an award of back pay by the National Labor Relations Board."<sup>103</sup> The difficulty lay in determining how much weight to allocate, respectively, to the statute's explicit reference to only NLRB back pay awards, and to the prefatory language of the statute, which makes the categories of income sources that follow, including NLRB awards, not necessarily exclusive and exhaustive.<sup>104</sup>

In *Frost*, the policy of liberal construction in favor of the claimant (or more specifically in this case, an awardee), was trumped by the countervailing policy, bearing the presumed authority of the legislature, of preventing the retention of windfall benefits.<sup>105</sup>

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<sup>97</sup>*Id.* at 1016.

<sup>98</sup>439 N.E.2d 1334 (Ind. 1982) (Hunter, J., dissenting to denial of transfer).

<sup>99</sup>*Id.* at 1334. See IND. CODE § 22-4-17-11 (1982); *Smith v. Review Board of Ind. Emp. Sec. Div.*, 159 Ind. App. 282, 306 N.E.2d 140 (1974) (construing IND. CODE § 22-4-17-11 (1971) to require that notice of appeal be in the actual physical custody of the review board within the statutory fifteen day period).

<sup>100</sup>See 439 N.E.2d at 1338.

<sup>101</sup>432 N.E.2d 459 (Ind. Ct. App. 1982).

<sup>102</sup>IND. CODE § 22-4-5-1 (1982).

<sup>103</sup>432 N.E.2d at 460.

<sup>104</sup>IND. CODE § 22-4-5-1 (1982).

<sup>105</sup>432 N.E.2d at 461. Among the federal cases decided during this survey period, a similar conflict between a liberal construction and the avoidance of arguable windfalls was

The general inference to be drawn from these cases would seem to be that in instances in which a flat denial of benefits impends, a careful statement by the claimant of the applicability and judicial pedigree of the policy of liberal construction may help tip the balance where case authority is mixed or absent.

### H. Standing

The court of appeals in *Stokes v. City of Mishawaka*<sup>106</sup> was confronted with the interesting issue of whether nonresidents of a city who own property contiguous with, but outside, city limits have standing to challenge the city's zoning ordinance on the grounds that the ordinance may adversely affect their property values. Certainly the standing requisites of sufficient individualized stake in the outcome and concrete adverseness were present.<sup>107</sup>

While no Indiana cases precisely on point were detected, the Missouri case of *Allen v. Coffel*<sup>108</sup> was favorably cited for the availability of standing in such circumstances.<sup>109</sup> Actually, standing under the circumstances in *Stokes* has been granted with some regularity.<sup>110</sup>

What is less clear is the appropriate scope of this rule of standing. As long as the requirement of contiguous land ownership is maintained,

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resolved in favor of the claimant in *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982) (refusing to impute to supplemental security income recipient, as unearned income, the excess of fair rental market value over actual rent paid by the recipient, where most of such excess was not "actually available" to recipient for conversion to the satisfaction of basic needs).

The court in *Jackson* distinguished four court of appeals cases dealing with the same regulations, and would have had a difficult time in distinguishing *Nunemaker v. Secretary of HEW*, 679 F.2d 328 (3d Cir. 1982) (decided six weeks before *Jackson*). *But see* *Young v. Schweiker*, 680 F.2d 680, 682-83 (Farris, J., concurring) (noting the typical non-convertibility of "extra" rental housing into food or cash in an equivalent sum); *Summy v. Schweiker*, 688 F.2d 1233, 1235 (9th Cir. 1982) (favorably citing *Jackson*). *See generally* Annot., 69 A.L.R. Fed. 230 (1983). For a case under the amended current regulations, see *Borney v. Schweiker*, 695 F.2d 164 (5th Cir. 1983).

<sup>106</sup>441 N.E.2d 24 (Ind. Ct. App. 1982).

<sup>107</sup>*See id.* at 24-25. Plaintiffs brought their action under the Uniform Declaratory Judgment Act, IND. CODE §§ 34-4-10-1 to -16 (1982). The issue in this case was whether the plaintiffs are "[persons] . . . whose rights, status or other legal relations are affected by . . . municipal ordinances." 441 N.E.2d at 26 (quoting IND. CODE § 34-4-10-2 (1982)).

<sup>108</sup>488 S.W.2d 671 (Mo. Ct. App. 1972).

<sup>109</sup>*See* 441 N.E.2d at 27-28.

<sup>110</sup>*See, e.g.,* *Schweig v. City of St. Louis*, 569 S.W.2d 215, 220-21 (Mo. Ct. App. 1978) (citing *Dahman v. City of Ballwin*, 483 S.W.2d 605, 609 (Mo. Ct. App. 1972) (dicta)); *Orange Fibre Mills, Inc. v. City of Middletown*, 94 Misc. 2d 233, 404 N.Y.S.2d 296 (Sup. Ct. 1978). A number of the directly applicable cases are cited in Annot., 69 A.L.R.3d 805 (1976). *See also* 4 R. ANDERSON, AMERICAN LAW OF ZONING § 28.03, at 358 (2d ed. 1977).

A standing problem of a different sort was addressed in *County Dep't of Pub. Welfare v. Stanton*, 545 F. Supp. 239 (N.D. Ind. 1982). In this case, the Lake County Department of Public Welfare sought payments from and a prospective injunction against the Indiana

imprudent overextension of standing would seem to be avoided. It seems apparent, though, that a municipality's zoning determinations can have readily demonstrable and substantial effects on the value of remote property. In a case in which a downwind property owner seeks to object to a city's zoning ordinance, conflicts arise among values such as municipal autonomy and self-determination, the ability of a municipality to effectuate its own policies, and the broader public interest, including an interest in discouraging local units of government from simply externalizing certain disamenities without regard to the costs involuntarily imposed.

### *I. Utility Rates and Appropriate Notice*

The case of *AFL-CIO, Central Labor Council v. Southern Indiana Gas & Electric Co.*<sup>111</sup> featured an appeal of a Public Service Commission order granting an electric utility rate increase. Issues of both substance and procedure were decided on appeal.

On the substantive side, the court determined that the PSC did not err in including, for rate-making purposes, certain power plant and pollution control devices as "used and useful" property even though the devices were not actually utilized, because of testing requirements, for the entire period of the selected test year.<sup>112</sup>

For this point, the court referred generally to the major Indiana utility rate case, *City of Evansville v. Southern Indiana Gas & Electric Co.*<sup>113</sup> While the jurisdictions nationally vary significantly in their willingness to include such items as property held for future use or construction work in progress in the rate base, there is ample authority for the position adopted by the court on appeal.<sup>114</sup> This approach would seem to offer the best accommodation of the widely accepted principle that current

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Department of Public Welfare respecting unreimbursed county department administrative expenses. The plaintiff raised challenges on supremacy clause and equal protection grounds to the applicable reimbursement statute. See IND. CODE § 12-1-18-2 (1982).

The court, in ruling on the defendant's motion to dismiss, noted that "[c]ounty departments of public welfare have a unique and frequently confusing position in Indiana." 545 F. Supp. at 243. The court determined that while the plaintiff county department might be viewed either as a political subdivision of the state, or as a subordinate local agency, under neither characterization did it have standing to challenge the statute in question. *Id.* at 243, 245. This result followed from holding the county department to be a creature of the state, and under the authority and control of the state department of public welfare. *Id.* at 245. See, e.g., *Smythe v. Lavine*, 76 Misc. 2d 751, 351 N.Y.S.2d 568 (Sup. Ct. 1974).

<sup>111</sup>443 N.E.2d 1243 (Ind. Ct. App. 1983).

<sup>112</sup>*Id.* at 1247-48.

<sup>113</sup>443 N.E.2d at 1247 (citing *City of Evansville v. Southern Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562 (1975)).

<sup>114</sup>In *Appalachian Power Co.*, 22 Pub. Util. Rep. 4th 548 (1977), the Virginia State Corporation Commission found that

[i]nstallation of pollution control equipment at the Amos Unit No. 2 and Kanawha River generating plants imposes a considerable financial burden on company while simultaneously reducing plant productivity. In our opinion, pollution control equip-

ratepayers should bear the costs allocable to the provision of the benefits in service they currently enjoy. This principle would also, in consistency, require the *exclusion* from the rate base of property recently retired from service.

On the procedural side, the court agreed that noncompliance by the utility with the strict terms of the applicable public notice requirements<sup>115</sup> authorizes, but does not require, the commission to dismiss or continue the hearings in question.<sup>116</sup> In a related matter, the court determined that the commission did not abuse its discretion in denying the petition of the City of Evansville, filed on the last day of the hearing, to intervene in the proceedings.<sup>117</sup> Evansville explained its apparent laxity on the grounds that while it had early notice of the utility's petition, the proposed rate schedule sought no rate increase for street lighting, and that such an increase materialized as an issue only at a late stage in the proceedings.<sup>118</sup>

On appeal, the court observed that "our cases have long held that a party given notice of a ratemaking proceeding is bound to know that its rates may be affected by the Commission's final order whether or not any changes in its rates are initially proposed or petitioned for."<sup>119</sup> Potential intervenors may therefore wish to avoid unfortunate outcomes by intervening in a timely fashion in any case holding any prospect of an adverse rate impact, but limiting their expenditures in connection with the hearing until their interests become jeopardized in some concrete fashion.

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ment installed by electric utilities during a test period should be treated as "in service" plant for the entire test period . . . .

*Id.* at 552.

In a Nevada commission case, *Trans-Service Water Serv., Inc.*, 37 Pub. Util. Rep. 4th 536 (1980), a filtration system was included in the rate base where it had been out of service for an extended period of time, but was due back in actual operation shortly. Pennsylvania has determined that non-operational property may be considered "used and useful" for inclusion in the utility's jurisdictional rate base where the return to service of the property in question is imminent and certain. *Pennsylvania Pub. Util. Comm'n v. Metropolitan Edison Co.*, 37 Pub. Util. Rep. 4th 77 (1980). In certain instances, adjustments have been ordered to reflect significant additions to a plant coming on line after the test year in question. *See, e.g., Edgartown Water Co.*, 41 Pub. Util. Rep. 4th 106 (1980).

The commissions involved adopted less liberal approaches under somewhat different circumstances in *Carolina Power and Light Co.*, 41 Pub. Util. Rep. 4th 315 (1981) and *Cleveland Elec. Illum. Co.*, 38 Pub. Util. Rep. 4th 494 (1980).

<sup>115</sup>Specifically, in this case, 170 IND. ADMIN. CODE § 4-1-18(c) (1979).

<sup>116</sup>443 N.E.2d at 1245.

<sup>117</sup>*Id.* at 1248 (citing 170 IND. ADMIN. CODE § 1-1-9(b) (1979)).

<sup>118</sup>443 N.E.2d at 1248.

<sup>119</sup>*Id.* (citing Indiana authority). *See also* *Hawaiian Elec. Co.*, 45 Hawaii 260, 535 P.2d 1102 (1975); *Bethlehem Steel Corp v. NIPSCO*, 397 N.E.2d 623 (Ind. Ct. App. 1979); *Gary Transit, Inc. v. Indiana Pub. Serv. Comm'n.*, 161 Ind. App. 7, 314 N.E.2d 88 (1974); *Checkasha Cotton Oil Co. v. Corporation Comm'n*, 562 P.2d 507 (Okla.), *cert. denied*, 434 U.S. 829 (1977).

### *J. Utility Rates and Consolidated Tax Returns*

During the past survey period, the court of appeals again addressed the difficult question of how a consolidated income tax return, filed by a utility's parent company, should be treated when the utility subsequently requests a rate increase.

Specifically, in *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.*,<sup>120</sup> the court on appeal was confronted by a situation in which the utility paid to its parent company the amount for which the utility would have been liable in income taxes had it filed a tax return on a separate entity basis. As it developed, the holding company that owned the parent company filed a consolidated return under which the holding company paid no tax because of loss carry forwards attributable to non-jurisdictional subsidiaries. On appeal, the court determined the utility's tax liability expense to be merely hypothetical, and the transfer from utility to parent to be an expense not lawfully to be borne by the utility's ratepayers.<sup>121</sup>

In reversing on this issue, the court reasoned that

[t]he Commission's own findings state that the result of the participation of [the utility] in a consolidated tax return is that no income taxes are paid to the U.S. government. Given that finding, we fail to understand how [the utility] can be said to have an *actual* income tax expense.<sup>122</sup>

The dictates of equity in such instances are often not unequivocal. There is a basis in equity for suggesting that consistency would require ratepayers to bear an actual income tax expenditure paid on a separate entity basis, even if the utility might have paid less had its parent filed a consolidated return.<sup>123</sup> It should be recognized as well that the benefits accruing to jurisdictional customers under the *Indiana Cities* rule may bear no relation to the share of the costs borne by such customers in generating the losses carried forward. Ultimately, should the courts recognize the consolidated filing status of utility subsidiaries only when it is most tempting as a practical matter to do so, a conflict with the regulatory objective

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<sup>120</sup>440 N.E.2d 14 (Ind. Ct. App. 1982).

<sup>121</sup>*Id.* at 15.

<sup>122</sup>*Id.* at 17. See *City of Muncie v. Public Serv. Comm'n.*, 378 N.E.2d 896, 898-99 (Ind. Ct. App. 1978); *United Tel. Co. v. Public Serv. Comm'n.*, 402 N.E.2d 1013, 1015-16 (Ind. Ct. App.), *reh'g denied in part*, 406 N.E.2d 1268 (Ind. Ct. App. 1980). A fuller statement of the commission's order in this cause is found in *Indiana Cities Water Corp.*, 45 Pub. Util. Rep. 4th 55 (1981). The leading authority cited by the commission is *Muncie Water Works Co.*, 44 Pub. Util. Rep. 4th 331 (1981).

<sup>123</sup>See generally *Public Serv. Comm'n v. Indiana Bell Tel. Co.*, 235 Ind. 1, 28-29, 130 N.E.2d 467, 480 (1955).



of providing investors with a competitive compensatory return would be expected.<sup>124</sup>

### K. Primary Jurisdiction and Interstate Commerce

In a careful opinion, the Seventh Circuit during the past survey period, in *Hansen v. Norfolk & Western Railway Co.*,<sup>125</sup> invoked the doctrine of primary jurisdiction,<sup>126</sup> but stayed rather than dismissed the plaintiff's complaint in order to preclude statute of limitations problems.

The plaintiff's complaint in *Hansen* alleged Interstate Commerce Act as well as antitrust violations. The plaintiff claimed that the defendant railroad had offered improper rebates, preferences, and kickbacks to its customers and had conspired with the other defendants to avoid certain tariffs.<sup>127</sup> On appeal, the court determined that the plaintiff's claims were appropriate for a judicial referral to the Interstate Commerce Commission of issues within its scope of particular expertise and of issues which might impinge on the Commission's uniform and consistent scheme of regulation.<sup>128</sup>

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<sup>124</sup>See 440 N.E.2d at 15 (citing *City of Evansville v. Southern Ind. Gas & Elec. Co.*, 167 Ind. App. 472, 339 N.E.2d 562, 568 (1975)).

During the past survey period, the Seventh Circuit issued several substantive holdings of importance specifically affecting Indiana public utilities. In *Indianapolis Power & Light Co. v. Interstate Commerce Comm'n*, 687 F.2d 1098 (7th Cir. 1982), the court on appeal indicated the circumstances under which tariff rates respecting intrastate rail shipment of bituminous coal fell within the jurisdiction of the Interstate Commerce Commission and the Indiana Public Service Commission, respectively.

In *Public Serv. Co. v. United States Envtl. Protection Agency*, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 762-63 (1983), the Seventh Circuit held that the EPA was statutorily empowered to partially approve Indiana's adopted revisions of its state implementation plan regarding ambient air quality, despite PSI's contentions that this result would allow the EPA to "approve something never actually adopted by the state." *Id.* at 632.

Finally, in *City of Frankfort v. Federal Energy Regulatory Comm'n*, 678 F.2d 699 (7th Cir. 1982), the Seventh Circuit held that Public Service Company of Indiana had discharged the burden, squarely placed on it by the court, to factually justify substantial disparities in rates charged to different municipal customers of the same class. Such justification in this case depended on PSI's discontinuance of fixed rate contracts, but the court indicated more broadly that a utility charged with price discrimination may defend on grounds other than cost of service differentials. *Id.* at 706. As to the burden of proof issue, compare *City of Frankfort* with *Park Towne v. Pennsylvania Pub. Util. Comm'n*, 61 Pa. Commw. 285, 433 A.2d 610, 614 (1981) (placing burden of showing discrimination on the challenging party).

<sup>125</sup>689 F.2d 707 (7th Cir. 1982).

<sup>126</sup>The court explained the doctrine of primary jurisdiction as applicable "when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme have been placed within the special competence of an administrative body.' " *Id.* at 710 (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). The appropriate judicial response to such a case is to hold its action until the administrative body has expressed itself on the matter. 689 F.2d at 710.

<sup>127</sup>689 F.2d at 709.

<sup>128</sup>*Id.* at 710-11.

The plaintiff's assertion of a statute-based, unqualified right to select its forum was dealt with by reference to the landmark Supreme Court case of *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*<sup>129</sup> Once the propriety of invoking the primary jurisdiction doctrine was established by the court,<sup>130</sup> the court of appeals was faced with the issue of whether to affirm Judge Holder's dismissal of the complaint without prejudice, or instead, to order a stay pending ICC action.

The court on appeal opted for the latter course even though the alternative of a stay had never been raised by the plaintiff in the court below, but had been raised in the defendant's district court brief.<sup>131</sup> Parties in the position of the plaintiff are urged to raise the possibility of a stay in the alternative, to avoid limitations of action problems, even though this procedure is referred to by the Seventh Circuit merely as "better practice."<sup>132</sup>

### L. Statutory Utility Reforms

The 1983 session of the General Assembly overwhelmingly passed a comprehensive utility reform package as House Bill 1712.<sup>133</sup>

Among the more significant features of the Act are sections establishing a low income household energy cost assistance program,<sup>134</sup> increasing the number of public service commissioners from three to five,<sup>135</sup> substantially increasing the annual salaries of the commission chairperson and members,<sup>136</sup> requiring that a commissioner rather than an administrative law judge conduct rate hearings in which an increase of more than twenty million dollars is sought,<sup>137</sup> upgrading the commission's professional staffing authority and authority to acquire necessary technical equipment,<sup>138</sup> prohibiting ex parte contacts in connection with evidentiary

<sup>129</sup>*Id.* at 710 (citing *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)). See also 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22:3 (2d ed. 1983).

<sup>130</sup>The Eighth Circuit has recently stated that "the ICC has primary jurisdiction over any matter that 'raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the Interstate Commerce] Act.'" *Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R.*, 685 F.2d 255, 259 (8th cir. 1982) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 65 (1956)). See also *Burlington N., Inc. v. United States*, 103 S. Ct. 514 (1982); *Bartlett & Co. Grain v. Union Pac. R.R.*, 528 F. Supp. 1234 (W.D. Mo. 1981). But see *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973) (inappropriateness of invoking primary jurisdiction doctrine in light of obvious violations by freight forwarders, absence of threat to regulatory uniformity, and need for speedy enforcement determination).

<sup>131</sup>689 F.2d at 714 n.10.

<sup>132</sup>*Id.*

<sup>133</sup>See Act of Apr. 22, 1983, Pub. L. No. 43-1983, §§ 1-14, 1983 Ind. Acts 407, 407-29.

<sup>134</sup>IND. CODE §§ 4-27-5-1 to -13 (Supp. 1983).

<sup>135</sup>*Id.* § 8-1-1-2(a) (effective January 1, 1984).

<sup>136</sup>*Id.* § 8-1-1-3(b).

<sup>137</sup>*Id.* § 8-1-1-3(e).

<sup>138</sup>*Id.* § 8-1-1-3(h).

proceedings,<sup>139</sup> providing for the appointment of a deputy consumer counselor for Washington affairs,<sup>140</sup> and establishing a committee for the purpose of nominating candidates for vacant public service commission positions to the governor.<sup>141</sup>

The Act also bars, with certain specified exceptions, general rate increase requests within fifteen months of the utility's previous such filing,<sup>142</sup> and establishes a gas cost pass-through provision.<sup>143</sup> Utilities providing electric or gas service are prohibited from terminating service between December 1 and March 15 to any person who is eligible and has applied for home energy assistance under newly added Indiana Code sections 4-27-5-1 to -13.<sup>144</sup> Subject to this provision, utilities must in most cases provide fourteen days notice of the disconnection of heating or energy service because of failure to pay bills, if the disconnection would fall within the period between November 1 and the following April 1.<sup>145</sup>

A final significant change effected by the Act requires public utilities to obtain a certificate of public convenience and necessity before beginning any construction of an electric generating facility, requires the commission to develop and appropriately utilize an analysis of long-term electric generating facility expansion needs, and makes other provisions with respect to powerplant construction.<sup>146</sup>

Noteworthy by its absence from this reform package is any reference to the widely-debated issue of recovery of the costs of construction work in progress.

### M. Textbook Assistance and Statutory Construction

Under what circumstances does the amendment of a federal statute, which has been incorporated by reference into a state statute, work a modification of the latter? In *Doe v. Indiana State Board of Education*,<sup>147</sup> the Indiana textbook assistance standard statutes<sup>148</sup> were to be keyed to food stamp program eligibility standards. The issue was whether the food stamp eligibility formula operative at the time of enactment of the Indiana statute, or as subsequently modified by Congress, would control eligibility for the state textbook assistance program.<sup>149</sup>

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<sup>139</sup>*Id.* § 8-1-1-5(e).

<sup>140</sup>*Id.* § 8-1-1.1-9.

<sup>141</sup>*Id.* §§ 8-1-1.5-1 to -10.

<sup>142</sup>*Id.* § 8-1-2-42(a).

<sup>143</sup>*Id.* § 8-1-2-42(g).

<sup>144</sup>*Id.* § 8-1-2-121.

<sup>145</sup>*Id.* § 8-1-2-122. The general involuntary disconnection notice period of seven days is established by 170 IND. ADMIN. CODE § 4-1-16(E)(1) (1979). The notice requirements of the new section 122 generally track those of 170 IND. ADMIN. CODE § 4-1-16(E)(2) (1979).

<sup>146</sup>IND. CODE §§ 8-1-8.5-1 to -7 (Supp. 1983).

<sup>147</sup>550 F. Supp. 1204 (N.D. Ind. 1982).

<sup>148</sup>See IND. CODE §§ 20-8.1-9-1, -2 (1982) (amended 1983).

<sup>149</sup>550 F. Supp. at 1205 (citing 7 U.S.C. § 2014 before and after the 1981 eligibility amendment).

The district court in this instance rejected the board of education's argument that the Indiana legislature had incorporated by reference only discrete provisions from the federal statute, as opposed to "the general law."<sup>150</sup> The court therefore rejected the inference that subsequent food stamp eligibility amendments were not to be considered incorporated. The court's reasoning rested in part on Indiana statutory references to federal food stamp eligibility standards in effect in any given year.<sup>151</sup>

The specific force of the court's decision in this case persisted until precisely April 4, 1983, on which date new amendments to the Indiana statutory standards for assistance to schoolchildren took effect.<sup>152</sup> The new standards attempt to pin assistance eligibility to a fixed sum income cutoff<sup>153</sup> or official "poverty line" cutoff,<sup>154</sup> as compared to the "maximum monthly or annual gross income available to a family."<sup>155</sup> The statute makes no provision for a method of calculating "gross income available to a family."<sup>156</sup>

#### N. Blind Assistance and Federal Supremacy

In *Kellum v. Stanton*,<sup>157</sup> the court granted summary judgment in favor of a class of Indiana blind persons less than eighteen years old on their claim that the operation of the Indiana Blind Assistance Statute<sup>158</sup> contravened the applicable federal social security statutes<sup>159</sup> and regulations<sup>160</sup> by imposing an impermissible eighteen year age eligibility requirement on potential recipients.<sup>161</sup>

<sup>150</sup>550 F. Supp. at 1205 (quoting *Meunich v. United States*, 410 F. Supp. 944, 946 (N.D. Ind. 1976)).

<sup>151</sup>550 F. Supp. at 1205-06; see IND. CODE § 20-8.1-9-2 (1982) (amended 1983).

<sup>152</sup>Act of Apr. 4, 1983, Pub. L. No. 214-1983, §§ 1-5, 1983 Ind. Acts 1351, 1351-54 (codified at IND. CODE §§ 20-8.1-9-1 to -11 (Supp. 1983)).

<sup>153</sup>IND. CODE § 20-8.1-9-2(a), (b) (Supp. 1983).

<sup>154</sup>*Id.* § 2(c), (d).

<sup>155</sup>*Id.* § 1(a).

<sup>156</sup>The vagueness of this standard may in a given case be remedied ad hoc through the exercise of the township trustee's discretion to pay for an ineligible child's school books, supplies, or other fees "[u]nder extraordinary circumstances." *Id.* § 11.

It should be noted that a challenge to an Indiana public school textbook rental policy, based not on equal protection, but on the "common schools" provision of the Indiana constitution, was rejected in *Chandler v. South Bend Community Schools Corp.*, 160 Ind. App. 192, 312 N.E.2d 915 (1974) (strictly construing the requirement in IND. CONST., art. VIII, § 1 of "tuition" without charge). For a collection of the disparate authorities in this general area, see *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 611 n.1, 264 S.E.2d 106, 109 n.1 (1980). See also *Johnson v. New York State Educ. Dep't*, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded*, 409 U.S. 75, 76-77 (1972) (Marshall, J., concurring).

<sup>157</sup>537 F. Supp. 1237 (N.D. Ind. 1982).

<sup>158</sup>See IND. CODE § 12-1-6-1 to -20 (1982).

<sup>159</sup>See 42 U.S.C. §§ 1201, 1206 (Supp. IV 1980).

<sup>160</sup>45 C.F.R. § 233.30(b)(1)(iii) (1980) (presently codified at 45 C.F.R. § 233.39(b)(1)(iii) (1982)).

<sup>161</sup>537 F. Supp. at 1241.

The key to the court's supremacy clause analysis was a line of Supreme Court cases to the effect that "'at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.'" <sup>162</sup> Finding an absence of such authorization with respect to blind persons under the age of eighteen, state coverage of such persons was determined to be mandatory.

Perhaps the fullest recent Seventh Circuit supremacy clause analysis is found in *Raskin v. Moran*, <sup>163</sup> where the court, using federal preemption and supremacy as interchangeable and essentially synonymous terms, <sup>164</sup> emphasized the validity of state law unless "the clear and manifest purpose of Congress" runs to the contrary. <sup>165</sup> But the court recognized the necessity to void state laws that are not merely inconsistent with, but operate as an "obstacle" to, congressional policy. <sup>166</sup> The court in *Raskin* refused to balance even an important and good faith independent state policy against an arguably less than crucial federal social security policy, and struck down the state regulation in question. <sup>167</sup>

It would thus appear that there is room for proponents of the validity of state statutes to argue for "mere" inconsistency of the state and federal statutes, and for an analysis under which congressional intent to preempt the area, or to trump inconsistent state law, must affirmatively appear.

#### O. Social Security and Equitable Estoppel

The District Court for the Northern District of Indiana ventured into poorly charted water in *McDonald v. Schweiker*. <sup>168</sup> The claimant in this case was deprived of the opportunity to receive retirement insurance benefits from her sixty-second birthday in November of 1978 by her reliance on a misstatement of fact by a representative of the Social Security Administration (SSA) to the effect that she needed more calendar quarters of work in order to qualify. The SSA agreed to pay the claimant benefits from the time she actually applied for them in August, 1979, when the prior misstatement was discovered, but denied her claim to payments dating back to the time of her actual eligibility.

The court granted the claimant's motion for summary judgment and found the SSA estopped from relying on the absence of the required writ-

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<sup>162</sup>*Id.* at 1239 (quoting *Townsend v. Swank*, 404 U.S. 282, 286 (1971)).

<sup>163</sup>684 F.2d 472 (7th Cir. 1982).

<sup>164</sup>*See id.* at 474-75.

<sup>165</sup>*Id.* at 475 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>166</sup>684 F.2d at 475 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>167</sup>684 F.2d at 479.

<sup>168</sup>537 F. Supp. 47 (N.D. Ind. 1981).

ten benefit application in denying benefits as of November, 1978. On the analysis in *McDonald*, once the elements of traditional estoppel are established, the question becomes whether "affirmative misconduct" on the part of the government is also present.<sup>169</sup> The court stated that "a finding of affirmative misconduct and the applicability of estoppel can only be determined through careful examination of the mistake made by the government, the claimant's ability to prove that the government made a mistake, and whether the claimant could have identified the mistake and avoided its consequences."<sup>170</sup> Having found that the government's mistake was one of fact rather than law; that the incident of the mistake, if not the precise error, was well-documented; and that the claimant could not have identified the mistake and avoided its consequences, the court held the government estopped and awarded the claimant back-payment.<sup>171</sup>

Easily the most problematic element of the *McDonald* test of affirmative government misconduct is the question of whether the government's error is properly characterized as one of fact or one of law. The logic of attaching significance to this distinction derives from the duty on the part of private persons to be independently familiar with the applicable law, undercutting the estoppel element of reasonable reliance. While the result, and apparently the test applied, in *McDonald* may be satisfying, the value of *McDonald's* contribution to clarifying the law of government estoppel may be modest.

In any given instance, it is notoriously difficult to characterize an erroneous statement on the part of the government as one of law or of fact. It becomes tempting to view such representations as mixed statements of law and fact. Are claimants to be charged with the knowledge of the truth or falsity of mixed legal-factual representations?

It seems clear as well that borderline cases are not the only troublesome ones. Some factual representations, based on erroneous records exclusively within the government's possession, may be so patently questionable as to put a prospective claimant on inquiry notice.

But it seems equally reasonable, if less well-grounded in the case law, to wonder whether holding all claimants, regardless of their sophistication, or the sums involved, to a knowledge of the law in all its complexity genuinely serves the public interest. Admittedly, this policy frees the SSA to make useful informal representations as to matters of law without fear of adverse fiscal consequences.

It is questionable, however, whether a rational disappointed applicant can be expected to seek out and pay for expensive legal advice con-

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<sup>169</sup>*Id.* at 50. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *Community Health Servs. v. Califano*, 698 F.2d 615, 621-24 (3d Cir. 1983); *Mendoza-Hernandez v. INS*, 664 F.2d 635, 639 (7th Cir. 1981); see also Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

<sup>170</sup>537 F. Supp. at 50.

<sup>171</sup>*Id.* at 50-52.

firming or questioning the agency's representations if the probability of the SSA's being correct, in view of its accumulated experience, is generally high. If it does not generally pay to check up on SSA's legal representations, should parties in effect be required to do so? Is this the least costly way of ensuring accurate and uniform eligibility determinations?<sup>172</sup>

*P. Uncompensated Hill-Burton Costs as Non-Reimbursable under Medicare*

During the past survey period, the Seventh Circuit, with congressional assistance, resolved the division of district court authority<sup>173</sup> as to the permissibility of reimbursement to hospitals under Medicare for performance of their free care obligations under the Hill-Burton Act.<sup>174</sup>

Specifically, in *Johnson County Memorial Hospital v. Schweiker*,<sup>175</sup> the Seventh Circuit reversed the decision of the District Court for the Southern District of Indiana<sup>176</sup> on the authority of its decision the same day in the consolidated case of *Saint Mary of Nazareth Hospital Center v. Department of Health & Human Services*.<sup>177</sup>

The court of appeals in *Johnson County* held that

Congress never intended to reimburse hospitals with Medicare funds for the free care the hospitals are obligated to perform under the terms of the Hill-Burton Act. Moreover, it would be improper to allow the hospitals to receive a double payment from the

<sup>172</sup>For the most recent sustained attempt to clarify the murky concept of "affirmative misconduct" on the part of the government, see *Community Health Servs. v. Califano*, 698 F.2d 615, 621-24 (3d Cir. 1983) (inquiring whether the unauthorized incorrect advice was "closely connected to the basic fairness of the administrative decision making process"). Cf. *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (per curiam) (looking not only into causality, but also to whether the error in question induced uncorrectable action or inaction by claimant and whether it involved the breach of a regulation). It may be noted that each of these two decisions, as well as a decision in the Second Circuit Court, *Hansen v. Harris*, 619 F.2d 942 (2d Cir. 1980), provoked dissenting opinions.

In *McDonald*, the government appealed the adverse summary judgment order to the Seventh Circuit, but did not file a brief, and eventually voluntarily dismissed with prejudice. This factor was among those taken into account when the district court awarded attorney's fees under the Equal Access to Justice Act, based on a finding that the government's position "was not substantially justified." *McDonald v. Schweiker*, 551 F. Supp. 327, 333 (N.D. Ind. 1982) (discussing as well issues of timeliness of application and exclusivity of attorney's fees under the Social Security Act). See 2 H. McCORMICK, *SOCIAL SECURITY CLAIMS AND PROCEDURES* § 777 (3d ed. 1983).

<sup>173</sup>Each of the relevant district court opinions is discussed in Wright, *Social Security and Public Welfare: 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 339, 344-45 (1983).

<sup>174</sup>See 42 U.S.C. § 291c(e) (1976).

<sup>175</sup>698 F.2d 1347 (7th Cir. 1983).

<sup>176</sup>*Johnson County Memorial Hosp. v. Schweiker*, 527 F. Supp. 1134 (S.D. Ind. 1981).

<sup>177</sup>698 F.2d 1337 (7th Cir. 1983) (consolidating the appeal of *St. James Hosp. v. Harris*, 535 F. Supp. 751 (N.D. Ill. 1981)).

government, and Congress did not intend to compensate hospitals a second time for medical care for which the government has already paid through contractual agreements for indigent care under the Hill-Burton Act.<sup>178</sup>

The court noted that a section of the 1982 Tax Equity and Fiscal Responsibility Act<sup>179</sup> had amended the applicable Medicare statute<sup>180</sup> to resolve retroactively the reimbursability issue and that the expressed post-congressional view was that non-reimbursability had always been the intent of Congress.<sup>181</sup> A related due process taking argument, in which the providers asserted a vested contractual right to reimbursement of the Medicare costs in question, was rejected on similar grounds.<sup>182</sup>

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<sup>178</sup>698 F.2d at 1350.

<sup>179</sup>96 Stat. 324 (1982).

<sup>180</sup>42 U.S.C. § 1395x(v)(1) (1976).

<sup>181</sup>698 F.2d at 1350 (quoting H.R. CONF. REP. No. 760, 97th Cong., 2d Sess. 431 (1982) reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1190, 1211).

<sup>182</sup>698 F.2d at 1350. *See also* Metropolitan Medical Center v. Harris, 693 F.2d 775 (8th Cir. 1982); Harper-Grace Hosps. v. Schweiker, 691 F.2d 808, 810 (6th Cir. 1982); Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982).

Among the miscellany of recent cases dealing with either substantive or jurisdictional administrative law are Synesael v. Ling, 691 F.2d 1213 (7th Cir. 1982) (upholding the validity of Indiana's five year "reachback" rule limiting Medicaid benefit eligibility in cases of asset transfers for inadequate consideration); American Healthcare Corp. v. Schweiker, 688 F.2d 1072 (7th Cir. 1982) (no constitutional entitlement shown under the circumstances to a pre-decertification hearing with respect to Medicare or Medicaid provider facilities, hence no waiver of exhaustion requirement, hence no subject matter jurisdiction); Indiana Hosp. Ass'n. Inc. v. Schweiker, 544 F. Supp. 1167 (S.D. Ind. 1982) (numerous Indiana hospitals not entitled to reimbursement of portion of return on equity capital, bad debt, and charity costs attributable to participation in Medicare program as "reasonable cost" thereof) (similar result obtained in Saline Community Hosp. Ass'n v. Schweiker, 554 F. Supp. 1133 (E.D. Mich. 1983)). *See generally* Neeley-Kvarme, *Administrative and Judicial Review of Medicare Issues: A Guide Through the Maze*, 57 NOTRE DAME LAW. 1 (1981).





## II. Business Associations

PAUL J. GALANTI\*

### A. *Liability of Successor Corporations*<sup>1</sup>

The impact of a judgment against a predecessor corporation was partially avoided in *Mishawaka Brass Manufacturing, Inc. v. Milwaukee Valve Co.*<sup>2</sup> *Mishawaka* was a split decision affirming in part and reversing in part a judgment of the St. Joseph County Circuit Court. In proceedings supplemental, the circuit court enforced a Wisconsin judgment obtained by Milwaukee Valve against Mishawaka Brass by holding liable both the Michiana Brass Manufacturing Company and the individual defendant who was the sole shareholder of both Mishawaka and Michiana.<sup>3</sup>

Mishawaka and the individual defendant entered into a sale and leaseback arrangement after the jury returned a verdict in the Wisconsin suit but before the entry of judgment.<sup>4</sup> Mishawaka ceased operations and sold its inventory and leasehold improvements to Michiana after the entry of the judgment. Michiana assumed Mishawaka's obligations under the lease with the individual defendant and paid some but not all of its debts.<sup>5</sup> The trial court concluded that the transfers of assets were not fraudulent, but held both the individual defendant and Michiana liable to the extent that they acquired Mishawaka's assets, because Michiana was a direct continuation of Mishawaka's operation.<sup>6</sup>

The court of appeals affirmed as to Michiana because the record was replete with evidence indicating that Michiana was formed to avoid Mishawaka's "bad name"; consequently, to the court, the two corporations were essentially the same. Although Mishawaka's name was changed

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<sup>1</sup>Although technically outside the scope of this survey period, it is worthy to note that the case of *Husted v. McCloud*, 436 N.E.2d 341 (Ind. Ct. App. 1982) was vacated by the Indiana Supreme Court in 450 N.E.2d 491 (Ind. 1983). The Supreme Court held that punitive damages could not be awarded against a partnership for the misconduct of one of its partners. For a full discussion of the supreme court opinion, see Galanti, *Business Associations, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. No. 1 (1985). For a discussion of the vacated court of appeals decision, see Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 279 (1982).

<sup>2</sup>444 N.E.2d 855 (Ind. Ct. App. 1983).

<sup>3</sup>*Id.* at 858.

<sup>4</sup>*Id.* at 856.

<sup>5</sup>*Id.* at 857.

<sup>6</sup>*Id.* The trial court found insufficient indicia of fraud to show that the transactions were made with the intent to defraud Milwaukee because the individual defendant had testified that he arranged the transactions for business purposes. *Id.* at n.2. A transfer of assets with an intent to defraud is void as to creditors. IND. CODE § 32-2-1-14 (1982).

to Michiana, this change would not relieve Michiana of Mishawaka's debts where the same business was being conducted by the same people in the same offices.<sup>7</sup> Affirming the judgment against the successor corporation is clearly correct; any other result would permit the easy circumvention of a judgment as long as there was enough evidence to persuade a court that the transfer was not "fraudulent."

In contrast, the court reversed as to the individual defendant.<sup>8</sup> The reversal was based upon two considerations: (1) the substantial protection against liability for corporate debts accorded shareholders by the Indiana General Corporation Act<sup>9</sup> and (2) the finding that there was no intent to defraud by the transfer of assets to the individual defendant. The absence of fraudulent intent precluded piercing the "corporate veil" which would clearly be justified with a fraudulent transfer.<sup>10</sup>

One member of the court concurred as to the corporation but dissented as to the individual defendant.<sup>11</sup> Judge Garrard felt bound by the trial court's findings that Michiana was a duly created separate corporation and that there were insufficient indicia of fraud.<sup>12</sup> This would appear to exonerate the corporation from Mishawaka's liabilities. Judge Garrard, however, used a different theory than the majority and found both defendants liable. He concluded that Indiana Code section 32-2-1-14, which provides that conveyances or assignments "made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages . . . shall be void as to the persons sought to be defrauded,"<sup>13</sup> justified holding Michiana and the individual defendant liable. Judge Garrard opined that the evidence clearly supported the inference that the transfer of assets to Michiana and the sale and leaseback arrangement with the individual defendant was done with an intent to hinder and delay Milwaukee Valve, a creditor, in collecting its lawful debt.<sup>14</sup>

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<sup>7</sup>The court did not cite any direct authority for this proposition. It did cite Annot., 49 A.L.R.3d 881 (1973) and 19 AM. JUR. 2d *Corporations* § 1150 (1965), which support imposing liability on a successor corporation, and referred to the Kentucky case of *Payne-Baker Coal Co. v. Butler*, 276 Ky. 211, 123 S.W.2d 273 (1938), where the transferor was held liable for the debts of the old corporation, despite some evidence that the transferor had acted in good faith and had paid just and adequate consideration, because the new corporation was for all intents and purposes the old enterprise with a slight name change.

<sup>8</sup>444 N.E.2d at 858.

<sup>9</sup>IND. CODE § 23-1-2-6(h) (1982). See *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980); *Birt v. St. Mary Mercy Hosp.*, 175 Ind. App. 32, 370 N.E.2d 379 (1977). See generally H. HENN, *LAW OF CORPORATIONS* § 146 (3d ed. 1983) [hereinafter cited as HENN].

<sup>10</sup>IND. CODE § 32-2-1-14 (1982). See *Coak v. Rebber*, 425 N.E.2d 197, 199 (Ind. Ct. App. 1981).

<sup>11</sup>444 N.E.2d at 858 (Garrard, J., concurring and dissenting).

<sup>12</sup>*Id.*

<sup>13</sup>IND. CODE § 32-2-1-14 (1982).

<sup>14</sup>444 N.E.2d at 859 (Garrard, J., concurring and dissenting). The burden is clearly on the person challenging a conveyance as being fraudulent. *Kourlias v. Hawkins*, 153 Ind. App. 411, 287 N.E.2d 764 (1972).

The problem with this approach is that section 32-2-1-14 as a whole seems to require more than just an intent to hinder or delay the collection of a lawful debt if for no other reason than the final reference to the “persons sought to be *defrauded*.” This reference would seem to require a greater showing than if the statutory reference was to “the creditors or other persons” or to “the persons sought to be hindered, delayed or defrauded.” An effort to hinder or delay not amounting to fraud would not seem to justify voiding an otherwise lawful conveyance.<sup>15</sup> The majority’s approach, however, protects a judgment creditor against most efforts to avoid a judgment when the debtor business is carried on by a nearly identical operation. At the same time, the limited liability status of shareholders is still honored.

Perhaps the problem with *Mishawaka* is the findings. The finding that there were insufficient indicia of fraud surrounding the transactions precludes the circuit court’s judgment that the individual defendant was liable.<sup>16</sup> It is possible that the majority questioned the finding concerning fraud but could not conclude it was clearly erroneous. Thus, recourse to the “successor” business theory was made by the court in order to hold Michiana liable. The dissenting judge, on the other hand, might have been willing to read section 32-2-1-14 too broadly with the consequence of holding both Michiana *and* the individual defendant liable despite insufficient evidence to support a finding that both transactions were fraudulent conveyances.

### B. Appointment of Receivers

The propriety of appointing a receiver for a corporation suffering internal dissension was raised in *Crippin Printing Corp. v. Abel*.<sup>17</sup> The *Abel* court reversed and vacated an order of the Marion County Superior Court appointing a receiver pendente lite in a shareholder’s suit to dissolve the corporation.<sup>18</sup> The complaining shareholder requested the appointment of a receiver on two grounds: (1) “an irreconcilable stockholder deadlock causing irreparable injury and damage to the corporation,” and (2) “the corporation’s actual, or imminent danger of, insolvency.”<sup>19</sup> The trial court made several findings of fact to the effect that an irreconcilable dispute among the shareholders was deadlocking management of the business and producing the prospect of irreparable harm to the corporation, and, con-

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<sup>15</sup>The question of fraudulent intent is, by statute, deemed to be a question of fact. IND. CODE § 32-2-1-18 (1982).

<sup>16</sup>There is no question that a shareholder stripping a corporation of assets may be held personally liable on a judgment against the corporation, *see generally* HENN, *supra* note 9, § 151, at 268, but the situation in *Mishawaka* would not seem to be an effort that could be characterized as a fraudulent stripping of assets.

<sup>17</sup>441 N.E.2d 1002 (Ind. Ct. App. 1982).

<sup>18</sup>*Id.* at 1008.

<sup>19</sup>*Id.* at 1003.

sequently, that a receiver was necessary to protect the corporation's assets and the shareholders' interests.<sup>20</sup>

On appeal, the corporation sought to overturn the appointment of the receiver on two grounds. The first ground was that the complaining shareholder lacked standing to seek relief.<sup>21</sup> The essence of the argument was that Abel, as a party to a share purchase agreement obligating him to sell his shares upon the termination of his employment with Crippin, lost his shareholder status and resultant standing as soon as he was discharged by the corporation.<sup>22</sup> The court, in rejecting this contention, held that Abel had standing because he was a shareholder of record.<sup>23</sup> Challenging Abel's standing might appear specious, but the corporation's argument was actually rather ingenious. Of course, ingenuity does not necessarily carry the day and the *Abel* court was correct in rejecting the contention.

The corporation argued that *State ex rel. Breger v. Rusche*<sup>24</sup> and *Doss v. Yingling*<sup>25</sup> supported its contention that Abel lacked standing.<sup>26</sup> As the court pointed out, however, *Breger* actually aided Abel because the *Breger* court noted that, as a general rule, corporate officers " 'can look no further than the legal title, as disclosed by the records of the corporation, in determining who is entitled to vote' " at a shareholder meeting.<sup>27</sup> This rule is codified in the Indiana General Corporation Act provision which states that a voting shareholder is entitled to "one (1) vote for each share of stock standing in his name on the books of the corporation."<sup>28</sup> The rule is also well settled in other jurisdictions.<sup>29</sup> The wisdom of the rule is self-evident. If a corporation is forced to look behind record ownership and determine, for example, beneficial ownership of securities, chaos could well reign at shareholder meetings.<sup>30</sup> Nor does *Doss v. Yingling* support

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<sup>20</sup>*Id.* at 1003-04.

<sup>21</sup>*Id.* at 1004.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 1005. See IND. CODE § 23-1-1-1(f) (1982), providing that "[t]he term 'shareholder' means one who is a holder of record of shares of stock in a corporation, unless the context otherwise requires."

<sup>24</sup>219 Ind. 559, 39 N.E.2d 433 (1942).

<sup>25</sup>95 Ind. App. 494, 172 N.E. 801 (1930).

<sup>26</sup>441 N.E.2d at 1004.

<sup>27</sup>*Id.* (quoting *State ex rel. Breger v. Rusche*, 219 Ind. 559, 562, 39 N.E.2d 433, 435 (1942)).

<sup>28</sup>IND. CODE § 23-1-2-9(e) (1982). See also *Grothe v. Herschbach*, 153 Ind. App. 224, 286 N.E.2d 868 (1972).

<sup>29</sup>See, e.g., *Salgo v. Matthews*, 497 S.W.2d 620, 628-30 (Tex. Civ. App. 1973). See generally HENN, *supra* note 9, § 191, at 374; 2 G. HORNSTEIN, CORPORATION LAW & PRACTICE §§ 543-44 (1959) [hereinafter cited as HORNSTEIN].

<sup>30</sup>Of course, a beneficial owner does have rights against the record owner vis-a-vis voting. For example, the Indiana General Corporation Act specifically provides that a person acquiring title to shares after the record date set for a meeting is "entitled to receive from the shareholder of record a proxy, with power of substitution, to vote" the shares. IND. CODE § 23-1-2-9(e) (1982).

the corporation's attack on Abel's standing. As the *Abel* court indicated, *Doss* involved the propriety of injunctive relief to prevent a shareholder from selling stock in violation of a share purchase agreement; it did not involve the standing of a shareholder of record to bring suit against the corporation.<sup>31</sup>

Crippin's second ground for attacking the appointment of the receiver was that the trial court's action was an abuse of discretion.<sup>32</sup> This contention was successful. The court of appeals recognized that the scope of review of an interlocutory order appointing a receiver was limited,<sup>33</sup> that the appropriate standard of review is for "abuse of discretion,"<sup>34</sup> and that a reversal is warranted only upon a clear abuse of discretion to the prejudice of the complaining party.<sup>35</sup> On the other hand, the court observed that the appointment of a receiver is "an extraordinary and drastic remedy"<sup>36</sup> in that it affects property rights. Consequently, receivership statutes are strictly construed.<sup>37</sup> With these two somewhat contradictory standards in mind, the *Abel* court held that the trial court erred in appointing the receiver.<sup>38</sup> Abel sought the receiver, in part, on the basis of section 34-1-12-1(5) of the Indiana Code of Civil Procedure, which authorizes the appointment of a receiver pendente lite when a corporation "is insolvent, or is in imminent danger of insolvency."<sup>39</sup> Insolvency has been defined as "the 'state of a person who is unable to pay his debts as they fall due in the usual course of trade or business.'"<sup>40</sup> Although the trial court found that without a proposed loan the corporation "would have difficulty continuing its normal operations,"<sup>41</sup> this could not and did not constitute a finding that the corporation was insolvent or in imminent danger of insolvency.<sup>42</sup>

The trial court demonstrated doubt about the sufficiency of the general receivership statute by acknowledging it was appointing the receiver pursuant to section 23-1-7-3(a)(5) of the Indiana General Corporation Act.<sup>43</sup>

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<sup>31</sup>441 N.E.2d at 1004. The defendant in *Doss* attempted to moot the case by transferring some of his shares. This ploy was unsuccessful because he retained the majority of his shares. 95 Ind. App. at 505, 172 N.E. at 804.

<sup>32</sup>441 N.E.2d at 1004.

<sup>33</sup>*Id.* at 1005 (citing *McKinley v. Long*, 227 Ind. 639, 88 N.E.2d 382 (1949)).

<sup>34</sup>441 N.E. 2d at 1005 (citing *United States Aircraft Financing, Inc. v. Jankovich*, 173 Ind. App. 644, 365 N.E.2d 783 (1977)).

<sup>35</sup>441 N.E.2d at 1005 (citing *Mead v. Burk*, 156 Ind. 577, 60 N.E. 338 (1901)).

<sup>36</sup>441 N.E.2d at 1005.

<sup>37</sup>*See State ex rel. Makar v. St. Joseph County Cir. Ct.*, 242 Ind. 339, 347, 179 N.E.2d 285, 289-90 (1962).

<sup>38</sup>441 N.E.2d at 1005.

<sup>39</sup>IND. CODE § 34-1-12-1(5) (1982).

<sup>40</sup>441 N.E.2d at 1005 (quoting *Chicago & S.E. Ry. v. Kenney*, 159 Ind. 72, 80, 62 N.E. 26, 28 (1901)).

<sup>41</sup>441 N.E.2d at 1005.

<sup>42</sup>*Id.* at 1005-06.

<sup>43</sup>IND. CODE § 23-1-7-3(a)(5) (1982).

This section permits the involuntary dissolution of a corporation where the "shareholders or directors are deadlocked in the management of the corporate affairs and the corporation is suffering, or is about to suffer, irreparable injury by reason thereof."<sup>44</sup> The statute further provides that the court having jurisdiction over an involuntary dissolution proceeding has "full power to appoint a receiver or receivers,"<sup>45</sup> and that the receiver "shall, under the supervision of the court, proceed with the liquidation of the affairs of the corporation in the same manner required of directors in liquidating the affairs of a corporation being voluntarily dissolved."<sup>46</sup>

The *Abel* court construed the dissolution statute to require a trial on the merits to determine whether an involuntary dissolution is justified before a receiver can be appointed.<sup>47</sup> That is not an unreasonable construction of the provision, but it might be too narrow. It is equally possible that the Legislature intended to give the courts authority to appoint receivers once the petition for dissolution has been filed. Admittedly, the Act is not as clear as section 98 of the Model Business Corporation Act which specifies that a receiver pendente lite can be appointed during a liquidation proceeding.<sup>48</sup> The Indiana Supreme Court, however, has recognized a judicial power to appoint a receiver to temporarily suspend activities of corporate officers where necessary to protect the corporation and minority shareholders.<sup>49</sup> Even the cases holding that mere dissension will not justify appointing a receiver where the corporation was solvent and prosperous do not appear to preclude a receiver pendente lite before a trial on the merits.<sup>50</sup> Further, in *Dynamite Drugs, Inc. v. Kerch*,<sup>51</sup> the Indiana Supreme Court upheld an order appointing a temporary receiver to manage and conserve assets of a closely held corporation because of the shareholders' irreconcilable differences even though there was no indication that the corporation was to be dissolved.

As Professor Hornstein asserts, a liquidating receiver is one appointed to effect a final decree dissolving a corporation and is to be "distinguished from a 'temporary receiver' who may be appointed at any stage in a proceeding under every court's inherent power to grant any provisional remedy deemed desirable to preserve property *sub judice*."<sup>52</sup> Appointing a receiver

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<sup>44</sup>*Id.*

<sup>45</sup>*Id.* § 23-1-7-3(b).

<sup>46</sup>*Id.* For the appropriate procedures see *id.* § 23-1-7-1(b)(3).

<sup>47</sup>441 N.E.2d at 1006. In *Abel*, the appropriateness of dissolution would depend upon the court's evaluation of the effect of the alleged deadlock in the corporate management.

<sup>48</sup>MODEL BUSINESS CORP. ACT § 98 (1971).

<sup>49</sup>*Tri-City Elec. Serv. Co. v. Jarvis*, 206 Ind. 5, 185 N.E. 136 (1933).

<sup>50</sup>*See, e.g., Indianapolis Dairymen's Coop. v. Bottema*, 226 Ind. 237, 79 N.E.2d 399 (1948).

<sup>51</sup>212 Ind. 568, 10 N.E.2d 624 (1937).

<sup>52</sup>HORNSTEIN, *supra* note 29, § 826, at 374. *See also* *Wollman v. Littman*, 35 A.D.2d 935, 316 N.Y.S.2d 526 (1970) (appointment of receiver to run a business until two shareholders suits resolved on merits).

before a determination of deadlock is actually desirable, assuming that the authority is exercised sparingly,<sup>53</sup> because it might prevent a corporation that is suffering internal disputes from in fact becoming insolvent or in imminent danger of insolvency. This would protect the interests of creditors<sup>54</sup> as well as shareholders.

It is possible, of course, that the *Abel* court was simply deciding the case on the merits; that is, that there was no deadlock threatening the business of the corporation.<sup>55</sup> Although the trial court found an irreconcilable dispute among the shareholders that constituted a present danger to the business, the court of appeals found that this dispute did not constitute a deadlock because three of the four directors' votes were against Abel.<sup>56</sup> Similarly, the court of appeals could not find a shareholder deadlock because there were no difficulties at the last annual meeting of the corporation and the time for the next annual meeting had not yet arrived. Furthermore, although Abel had attempted to call a special shareholder meeting, no meeting actually occurred where there had been a shareholder deadlock on any issue.<sup>57</sup> Nevertheless, Abel did own fifty percent of the shares of the corporation, which could support an inference that a shareholder deadlock was in the making.<sup>58</sup> The court concluded that a potential or even probable shareholder deadlock does not support the appointment of a receiver pendente lite. A receiver should be appointed only when there is dissension between equal shareholders creating a present danger of dissipation of corporate assets.<sup>59</sup>

It is possible to wonder why the court did not perceive both dissension between two sets of shareholders and a present danger to the corporation. It was distinctly possible that the next annual meeting of the shareholders would result in a deadlock on the election of directors. Abel

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<sup>53</sup>*Compare* Indianapolis Brewing Co. v. Bingham, 226 Ind. 137, 78 N.E.2d 432 (1948) (affirming as within trial court discretion the appointment of a receiver before a trial on the issue of whether the defendant corporation was in imminent danger of insolvency) with Lafayette Realty Corp. v. Moller, 247 Ind. 433, 438, 215 N.E.2d 859, 861 (1966) (reversing appointment of receiver and stating appointment of receiver is only appropriate if no other remedy is available because "[a] receivership as a rule results in a disruption of the business, if not a termination of the same").

<sup>54</sup>It is appropriate to appoint a receiver for a dissolved corporation under the fifth paragraph of section 34-1-12-1 of the Indiana Code until the merits of an asserted creditor's claim can be judicially resolved. Seaney v. Ayres, 135 Ind. App. 585, 595, 189 N.E.2d 826, 830 (1963).

<sup>55</sup>The court also examined, but rejected, the third and seventh paragraphs of section 34-1-12-1 of the Indiana Code, the receiver statute, in making its conclusion. 441 N.E.2d at 1006. The third paragraph authorizes the appointment of a receiver when property, funds, etc. may be materially injured. The seventh paragraph authorizes the appointment when necessary to secure ample justice to the parties.

<sup>56</sup>441 N.E.2d at 1006.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* at 1006-07.

<sup>59</sup>*Id.* at 1007.



presumably would not vote the fifty percent of the shares he owned for the re-election of the three directors who removed him from office. Under the Indiana General Corporation Act, the existing board would continue in office if no successor board was elected.<sup>60</sup> Technically there would never be a "director" deadlock but ignoring the most likely result of the dispute seems to give short shrift to Abel's interest as a shareholder. Admittedly, the circumstances in *Abel* were not as "dire" as in other cases where a receiver has been appointed,<sup>61</sup> but the corporation did have severe problems because of the internal dispute. The General Corporation Act requires irreparable harm before a corporation can be involuntarily dissolved,<sup>62</sup> but there is no truly legitimate reason to maintain a corporation simply because it is paying its bills.<sup>63</sup> Although Abel might have an action at law or be able to seek a less extreme equitable remedy than the appointment of a receiver if the corporation should deny him his rights,<sup>64</sup> it is unduly myopic to subject the parties to further conflict and the likely prospect of another lawsuit if and when a successor board cannot be elected.

### C. Share Purchase Agreements

*Stech v. Panel Mart, Inc.*,<sup>65</sup> decided during the survey period, warrants a brief mention as a reminder to attorneys of the importance of careful drafting of share purchase agreements. In *Stech*, the court of appeals affirmed in part, reversed in part, and remanded a judgment of the Allen County Superior Court.<sup>66</sup> The action was filed by the corporation against the estate of a shareholder and his widow to establish the terms of a share purchase agreement and to require her to sell the shares involved to the corporation.<sup>67</sup>

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<sup>60</sup>IND. CODE § 23-1-2-11(d) (1982).

<sup>61</sup>The *Abel* court pointed to *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 61 N.E. 666 (1901) and *Dynamite Drugs, Inc. v. Kerch*, 212 Ind. 568, 10 N.E.2d 624 (1937), as demonstrating "the dire circumstances which justify a receiver." 441 N.E.2d at 1007.

<sup>62</sup>IND. CODE § 23-1-7-3(a)(5) (1982).

<sup>63</sup>See generally Chayes, *Madame Wagner and the Close Corporation*, 73 HARV. L. REV. 1532 (1960); Recent Developments, *Corporations*, 68 HARV. L. REV. 714 (1955).

<sup>64</sup>The Indiana Supreme Court has stated that it is "axiomatic that a receiver should not be appointed if the plaintiff has an adequate remedy at law or by way of temporary injunction." *Ziffrin Truck Lines, Inc. v. Ziffrin*, 242 Ind. 544, 547, 180 N.E.2d 370, 372 (1962).

<sup>65</sup>434 N.E.2d 97 (Ind. Ct. App. 1982).

<sup>66</sup>*Id.* at 104.

<sup>67</sup>*Id.* at 99. The wife and the estate counterclaimed for attorney fees based on the corporation's refusal to pay sums owed them. The court of appeals held that the trial court did not abuse its discretion in denying this claim because the corporation had not acted with the bad faith or obstreperousness which would justify the awarding of attorney fees. *Id.* at 104. See *Cox v. Ubik*, 424 N.E.2d 127 (Ind. Ct. App. 1981); *St. Joseph's College v. Morrison, Inc.*, 158 Ind. App. 272, 302 N.E.2d 865 (1973).

In *Stech*, the shareholders probably contemplated that the estate of a deceased principal in the business would sell all shares owned at the time of his death to the corporation, but the shares in question had been issued to the shareholder and his wife as joint tenants. The trial court found the agreement ambiguous because the printed word "survivors" in a whereas clause had been crossed out and the word "company" interlined in handwriting.<sup>68</sup> Consequently, parol evidence was admitted to show that the agreement was intended to prevent the wives from becoming active participants in the business. The trial court then ordered the widow and the estate to sell the disputed shares to the corporation for the agreed-upon purchase price.<sup>69</sup>

The court of appeals concluded that the whereas clause was not contractual and could not control the express provisions of the agreement.<sup>70</sup> A preliminary recital can, however, aid in determining the intention of the parties when the express language of the contract is uncertain.<sup>71</sup> Unfortunately for the corporation, the court of appeals did not agree that the handwritten substitution of "company" for "survivors" created an ambiguity. Rather, it concluded that the recital eliminated an ambiguity in the operative portions of the stock purchase agreement. The only purchase referred to in the operative portions of the agreement concerned the sale of shares during the lifetime of a shareholder; however, reading the agreement as a whole clarified the fact that the estate of the deceased shareholder was to sell the shares back to the corporation.<sup>72</sup> In other words, the signers of the agreement intended the company, not the surviving shareholders, to have an option to purchase the shares upon the death of one of the shareholders.

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<sup>68</sup>434 N.E.2d at 100.

<sup>69</sup>The wife and the estate argued the agreement was unconscionable because it provided a purchase price of \$250 per share whereas the market value of the shares was at least \$1,250. *Id.* at 103. The court rejected this contention because there was neither a gross disparity in the bargaining powers of the parties involved nor was it an agreement that a sensible person would not enter except under delusion, duress, or distress or one that no honest and fair person would accept. *Id.* See *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980) (citing *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971)). As the *Stech* court noted, each shareholder was wagering that one of the others would be the first to die. The result reached on this issue was clearly correct. Courts are very reluctant to intercede where the parties to a share purchase agreement have set a price or a formula for determining the value of the shares. *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957) (remanding case to trial court with instructions to find whether a party to the agreement had committed extreme overreaching); *In re Estate of Mather*, 410 Pa. 361, 189 A.2d 586 (1963) (upholding a stock purchase agreement which required estate to sell stock to the remaining shareholders for \$1 per share, even though the market value of the stock was \$1,600 per share).

<sup>70</sup>434 N.E.2d at 100. See *Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949); *Irwin's Bank v. Fletcher Savings & Trust Co.*, 195 Ind. 669, 145 N.E. 869 (1924).

<sup>71</sup>434 N.E.2d at 100.

<sup>72</sup>*Id.* at 101.

The terms of the agreement controlled because there was no ambiguity. It was still necessary, however, to determine the obligation of the widow, who was also the personal representative of the estate, with respect to the shares. The whereas clause referred to the shares "owned by the decedent at the time of his death" and because as a joint owner Stech had only an undivided one-half interest in the shares at the time of his death, that was all the estate was obligated to sell.<sup>73</sup>

The result reached in *Stech* appears to be correct.<sup>74</sup> There really is no ambiguity in the agreement to justify departing from the terms through the introduction of parol evidence. However, it is very likely the parties did expect the corporation to get all of Stech's shares when he died, even though the shares were issued jointly to Stech and his wife.<sup>75</sup> That might be what the parties intended, but it is not what the agreement provided. The court of appeals was right in not requiring the widow to sell her undivided one-half interest.

The message of *Stech* is clear. Whenever share purchase agreements are being drafted, the drafter must make certain that what is specified in the agreement is in fact what the parties intend and wish. Failure to exercise care and to contemplate the possible ramifications is a sure invitation for litigation.

#### D. Imputing Knowledge to Corporate Officers

*Merchants National Bank & Trust Co. v. H.L.C. Enterprises, Inc.*<sup>76</sup> is another case that should be noted by attorneys representing closely held corporations. In *H.L.C.*, the court of appeals reversed and remanded a judgment of the Johnson County Superior Court<sup>77</sup> which had limited the liability of one mortgagor in a mortgage foreclosure suit.<sup>78</sup> It is possible that the busy corporate practitioner could overlook *H.L.C.* because the case was primarily concerned with the effect of a "dragnet" clause in a residential mortgage signed by a husband and wife which provided that the mortgage would "also secure the payment of any other liabilities, joint, several, direct, indirect, or otherwise, of Mortgagors"<sup>79</sup> to the mortgagee. The issue was whether this clause made the wife liable for the debts of

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<sup>73</sup>*Id.* at 103.

<sup>74</sup>Share transfer restrictions are strictly construed. *See generally* W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 477 (5th ed. unabridged, 1980).

<sup>75</sup>This conclusion, and the conclusion of the trial court for that matter, may be questioned. It appears that 50 shares were registered outright in the name of one of the wives, lending support to the argument that the parties contemplated that a shareholder's wife would retain an undivided one-half interest in shares held jointly with her husband. 434 N.E.2d at 99.

<sup>76</sup>441 N.E.2d 509 (Ind. Ct. App. 1982).

<sup>77</sup>*Id.* at 514.

<sup>78</sup>*Id.* at 511.

<sup>79</sup>*Id.* at 512.

a corporation of which she was the secretary and joint shareholder.<sup>80</sup>

The trial court treated her as a collateral guarantor and limited her liability because she had neither received nor waived "notice" of the corporation's default in paying its obligations or of renewals of the corporation's notes.<sup>81</sup> However, the court of appeals held that the circumstances surrounding the signing of the mortgage and the owner's consent authorizing the corporation to pledge the residential real estate as collateral for its debts dictated that she was bound on advances made by Merchants after the signing of the documents.<sup>82</sup>

Of interest to the corporate practitioner is the court's treatment of the wife as the secretary and shareholder of the corporation. It acknowledged that a dragnet clause in a joint residential mortgage would not by itself secure subsequent business loans made to the husband individually where the business loans were not part of the original transaction and the wife was not connected with the business.<sup>83</sup> The clause, however, did apply in the *H.L.C.* situation because she was an officer and shareholder of the corporation and was aware of its ailing financial condition.

Furthermore, the court was willing to impute the husband's knowledge of the corporation's condition to the wife. The court recognized, of course, the presumption that a corporation is a separate and distinct legal entity from its shareholders, officers, and directors,<sup>84</sup> but further recognized that the corporate fiction can be disregarded or the corporate veil pierced in the interest of justice and equity.<sup>85</sup> The court technically was not disregarding the corporate fiction because the issue was whether she would be obligated on her mortgage guaranty. The issue, however, is the same: Would it be equitable to impute the husband's knowledge of the corporation's financial ill health to her?<sup>86</sup>

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<sup>80</sup>She previously had executed a continuing guaranty of the venture when Merchants had provided the corporation with a capital loan and line of credit. *Id.* at 511.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.* at 514.

<sup>83</sup>*Id.* at 513-14. See *Security Bank v. First Nat'l Bank*, 263 Ark. 525, 565 S.W.2d 623 (1978). The wording of the dragnet clause may also be a factor in deciding whether an individual is severally liable. See *Holiday Inns, Inc. v. Susher-Schaefer Investment Co.*, 77 Mich. App. 658, 259 N.W.2d 179 (1977).

<sup>84</sup>441 N.E. 2d at 514. See *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980); *Birt v. St. Mary Mercy Hosp., Inc.*, 175 Ind. App. 32, 370 N.E.2d 379 (1977).

<sup>85</sup>441 N.E.2d at 514. The court cited *Forester & Jerue, Inc. v. Daniels*, 409 So.2d 830 (Ala. 1982), for this proposition, but it is clearly the law in Indiana. See *Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 242 N.E.2d 128 (1968). See generally HENN, *supra* note 9, § 146; HORNSTEIN, *supra* note 29, § 756.

<sup>86</sup>441 N.E.2d at 514. The court found authority for imputing the husband's knowledge to the wife in 19 AM. JUR. 2d *Corporations* § 1287, at 694 (1965) and the Connecticut case of *Lettieri v. American Sav. Bank*, 182 Conn. 1, 437 A.2d 822 (1980). It should be noted, however, that in *Lettieri* and in *H.L.C.* it appears that the persons charged with notice had in effect delegated all responsibility for running the corporation to one person. 441 N.E.2d at 514. It is appropriate to treat this delegation as an acquiescence in the refi-

The result in *H.L.C.* is appropriate under the circumstances. Not only was the wife an officer and shareholder of the corporation, but it is also inconceivable that she did not know the business was still in trouble after the initial advance by Merchants even if she did not in fact know of the particular advances made subsequent to the mortgage. The situation in *H.L.C.* may not be unusual considering the recent increase in business failures, but the conventional presumption of separateness will still protect most shareholders, officers, or directors. However, the case is a reminder to the attorney that under some circumstances the courts will not allow the corporate entity to be a shield against personal liability, particularly when the party involved is a spouse who has some, albeit tenuous, connection with the operation of the business, and where the refusal to impute knowledge would work an injustice.

### *E. Securities Act Standing*

*Zack Co. v. Sims*,<sup>87</sup> a decision of the Appellate Court of Illinois, should be mentioned in this survey because, among other issues, it construes the standing element of Indiana Code section 23-2-1-19, the civil liability provision of the Indiana Securities Act. The issue before the court in *Zack* was whether the former wife of defendant Sims was a "purchaser" within the meaning of section 23-2-1-19, thus entitling her to rescind Sims' purchase, with his former wife's money, of shares of an Indiana corporation.<sup>88</sup> This court decided she was not.<sup>89</sup> The shares were registered in Sims' name although Mrs. Sims apparently thought she would be a joint shareholder with the venture being for their mutual benefit. She was not disabused of this notion until they divorced.<sup>90</sup>

Plaintiffs contended that Sims' failure to disclose his intentions with respect to the shares was an omission of a "material fact" in contravention of the antifraud provision of both the Indiana<sup>91</sup> and Illinois<sup>92</sup> Securities Acts. A material fact is one that a reasonable investor would take into account in making an investment decision.<sup>93</sup> There can be little doubt that

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nancing of the business, but this factor clearly indicates that courts will exercise considerable discretion in imputing knowledge to corporate officers and shareholders.

<sup>87</sup>438 N.E.2d 663 (Ill. App. Ct. 1982).

<sup>88</sup>*Id.* at 674.

<sup>89</sup>*Id.* at 675.

<sup>90</sup>*Id.* at 667-68. *Zack* is a classic example of a somewhat casually run family enterprise which operated successfully until the relationship collapsed. An attorney was involved with the transaction, but it is not clear to what extent. *Id.* at 667. For example, it appears that some of the corporate documents were revised by a non-attorney. *Id.* at 667-68. It might be difficult for an attorney dealing with family members to suggest the advisability of clear and unequivocal agreements setting forth each person's rights, but the suggestion should be made, if at all possible, to avoid time-consuming and expensive litigation such as *Zack*.

<sup>91</sup>IND. CODE § 23-2-1-12 (1982).

<sup>92</sup>ILL. REV. STAT. ch. 121½, par. 137.12(G) (1979).

<sup>93</sup>See *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979), discussed in Galanti,

a reasonable investor would consider important the manner in which shares were to be registered on the books of a corporation; therefore, Sims' failure to disclose his plans to register the shares in only his name would clearly reach the threshold of materiality within the meaning of the antifraud provisions.

However, the question before the court was not the materiality of the nondisclosure but whether the plaintiff was entitled to the rescission remedy provided by the Securities Act because she financed the purchase of the shares. The court answered this question in the negative, relying on the Illinois case of *Gowdy v. Richter*,<sup>94</sup> which defined purchaser as used in the Illinois Securities Act as "a party to a transaction wherein he assumes ownership in exchange for valuable consideration."<sup>95</sup> The wife in *Gowdy*, who had furnished the money so that the husband could purchase the securities, was not a "purchaser" within the meaning of the statute because she was *outside* the actual contract negotiations for the purchase of the shares. In fact, the result in *Gowdy* was harsher than that in *Zack* because, as the *Zack* court noted, in *Gowdy* the shares had been issued to the husband and wife as joint tenants.<sup>96</sup>

The *Zack* result seems unduly harsh on a person who finances a securities transaction. However, it appears to be the correct result. It should be noted that the civil liability provision of the Illinois and Indiana Securities Acts are not identical. The Illinois statute provides that a sale of securities made in violation of the Act is "voidable at the election of the purchaser,"<sup>97</sup> whereas the Indiana statute gives a remedy "to any other party to the transaction" who did not know of or participate in the violation of the Act.<sup>98</sup> The difference in the language should be of no moment because the drafters of the two statutes, as well as those of the Uniform Act, apparently contemplated that rescission would be limited to actual parties to the transaction, be that a "purchaser" or "buyer" where relief is available only to purchasers,<sup>99</sup> or a "party to the transac-

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*Business Associations, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 91 (1981); see also *Kelsey v. Nagy*, 410 N.E.2d 1333 (Ind. Ct. App. 1980).

<sup>94</sup>20 Ill. App. 3d 514, 314 N.E.2d 549 (1974).

<sup>95</sup>*Id.* at 522, 314 N.E.2d at 555. See also *Williamson v. Berry*, 49 U.S. 495 (1850).

<sup>96</sup>438 N.E.2d at 675.

<sup>97</sup>ILL. REV. STAT. ch. 121½, par. 127.13A (1979).

<sup>98</sup>IND. CODE § 23-2-1-19(a) (1982). The Indiana Act refers to the "transaction" because section 23-2-1-19 was amended in 1975 to give a cause of action to the seller as well as to the purchaser of securities. See generally Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975). Before the amendment, section 23-2-1-19 provided that the seller of a security in violation of the act was "liable to the person buying the security from him." Identical language is used in the civil remedy provision of the Uniform Securities Act, UNIF. SEC. ACT § 410, 7A U.L.A. 670 (Master ed. 1978). from which section 23-2-1-19 was derived.

<sup>99</sup>See *Financial Programs, Inc. v. Falcon Financial Services, Inc.*, 371 F.Supp. 770 (D. Ore. 1974).

tion" where relief is available, as it is under the Indiana Act, to both purchasers and sellers.<sup>100</sup>

State securities acts are to be liberally construed,<sup>101</sup> but there must be limits to the scope of the civil liability provisions. Limiting the rescission remedy to only those who are actual parties to the questioned transaction and those who clearly can be deemed "purchasers" is appropriate and comports with the language of the statutes.<sup>102</sup> Furthermore, although not cited in *Zack*, a similar result was reached in *Rucker v. La-Co., Inc.*<sup>103</sup> where the court, in applying the Arkansas Securities Act, declined to hold a bank liable where it "was not a seller nor a participant in the sale, but only a lender on the securities purchased."<sup>104</sup> *Rucker* is actually the converse of *Zack* and *Gowdy* because the issue was the liability, rather than the standing, of a non-participant, but the effect is the same, that is, the civil remedy is available only to a participant to the transaction.<sup>105</sup>

The former Mrs. Sims was not without recourse, however. The *Zack* court concluded that she was entitled to a resulting trust in one-half of a block of shares constituting ninety percent of the outstanding shares of the Indiana corporation,<sup>106</sup> even though the trial court had refused to impose such a trust.<sup>107</sup> Thus, an aggrieved financier of a securities transaction is likely to have appropriate relief without unduly stretching the term "purchaser" as used in securities acts. Of course, it might very well be that someone in the position of the former Mrs. Sims should have recourse under a state securities act, but that is an argument for the legislature, not the court.

*Zack* was primarily concerned with Illinois law and it does not specifically state that the term "purchaser" as used in section 23-2-1-19(a) of the Indiana Securities Act<sup>108</sup> excludes a party outside the actual transaction who has furnished funds. However, that is the clear holding of *Zack* which denied Mrs. Sims relief under the Indiana Act. It is a result that should be followed if the issue ever arises in an Indiana court.

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<sup>100</sup>Of course, Indiana Code section 23-2-1-19(b) does provide for vicarious liability for persons who might not actually be involved in the transaction. See *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979).

<sup>101</sup>See *Norville v. Alton Bigtop Restaurant, Inc.*, 22 Ill. App. 3d 273, 317 N.E.2d 384 (1974); see also *Labenz v. Labenz*, 198 Neb. 548, 253 N.W.2d 855 (1977).

<sup>102</sup>*Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (only purchasers or sellers have standing to sue for violations of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982)).

<sup>103</sup>496 F.2d 850 (8th Cir. 1974).

<sup>104</sup>*Id.* at 853.

<sup>105</sup>It has been held in Indiana that a transferee of stock from the original purchaser was not entitled to recover damages resulting from false representations made by the issuer even if the shares were issued in violation of the Securities Act. *Elliott v. Kern*, 90 Ind. App. 453, 161 N.E. 662 (1928).

<sup>106</sup>438 N.E.2d at 672.

<sup>107</sup>*Id.* at 666.

<sup>108</sup>IND. CODE § 23-2-1-19(a) (1982).

### F. Statutory Developments

1. *Subchapter S Corporations*.—There were several significant statutory developments during the survey period. One such enactment<sup>109</sup> added section 6-2.1-3-24.5<sup>110</sup> to the Indiana Gross Income Tax Act. This provision, the so-called “free lunch bill,”<sup>111</sup> exempts gross income received by a Subchapter S corporation from the Indiana Gross Income Tax if the corporation opts to pay standard Indiana corporate taxes. Although it would appear strange to call a bill that gives corporations the option to pay more taxes a free lunch bill, it is a free lunch because the total tax liability of the electing Subchapter S corporation and its shareholders can be reduced. Indiana is benefited because it would receive taxes that were previously not being paid by Subchapter S corporations. There is, of course, no such thing as a free lunch and the net effect of the benefit would be at the expense of the federal treasury.<sup>112</sup>

2. *Small Claims Rules*.—During the survey period the Indiana Supreme Court added rule 8(c) to the rules for small claims court.<sup>113</sup> Rule 8(c) permits a corporation to designate a full-time employee to appear for the corporation in the prosecution or defense of unassigned claims not exceeding \$300 arising out of the corporation’s business. The new rule prohibits persons who have been disbarred or suspended from the practice of law in Indiana or any other jurisdiction from appearing for a corporation. It also specifies that the corporation will be bound by any and all agreements relating to the proceeding made by the representative and that it will be liable for any and all costs, including those assessed by reason of contempt, levied by a court. The corporation is also required to file with the court exercising jurisdiction a certificate of compliance with the rule. This certificate must indicate that the corporation will be bound by the employee’s acts and will be liable for assessments and costs.<sup>114</sup>

The effect of this rule was to counter the Indiana Supreme Court’s decision in *State ex rel. Western Parks, Inc. v. Bartholomew County Court*.<sup>115</sup> *Western Parks* struck down section 34-1-60-1 of the Indiana Code,<sup>116</sup> which authorized corporations to appear in small claims proceedings other than by an attorney, and held that a corporation had to

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<sup>109</sup>Act of Mar. 23, 1983, Pub. L. No. 78-1983, § 1, 1983 Ind. Acts 662, 662. This Act takes effect January 1, 1984 for tax years beginning after December 31, 1983.

<sup>110</sup>IND. CODE § 6-2.1-3-24.5 (1982 & Supp. 1983).

<sup>111</sup>Indpls. Bus. J., Feb. 14-20, 1983, at 7.

<sup>112</sup>For further discussion of the tax consequences of this enactment, see Smith & Hetzner, *To Incorporate or Not to Incorporate—After ‘Indiana SBC Act’*, 27 RES GESTAE 270 (1983).

<sup>113</sup>IND. R. TR. P. SM. CL. 8(c).

<sup>114</sup>*Id.* The employee must file an affidavit stating that he or she has not been disbarred or suspended from the practice of law in Indiana or any other jurisdiction.

<sup>115</sup>383 N.E.2d 290 (Ind. 1978), discussed in Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 145-50 (1980).

<sup>116</sup>IND. CODE § 34-1-60-1 (1976).



"be represented by legal counsel in a small claims court proceeding."<sup>117</sup> The new rule is a reasonable compromise between the interest of business in reducing legal expenses and the interest of the Indiana Supreme Court in maintaining control over the practice of law in this state. Requiring the corporation to file a certificate of compliance and prohibiting disbarred or suspended attorneys from representing corporations adequately protects the legal system by prohibiting disbarred attorneys from being hired by corporations with a substantial number of small claims.<sup>118</sup> Corporations, on the other hand, are benefited by the right to have an employee handle claims not exceeding \$300 where the expense of an attorney might far exceed the value of the claim.<sup>119</sup>

3. *Professional Corporations.*—One of the most significant legislative developments was the adoption of a single comprehensive Professional Corporation Act<sup>120</sup> to replace the four separate Indiana Professional Corporation Acts.<sup>121</sup> The development is important because the prior law was, to be charitable, somewhat of a mish-mash.<sup>122</sup>

There is some irony in the new Indiana Professional Corporation Act. The development of professional corporations was prompted because pro-

<sup>117</sup>383 N.E.2d at 293.

<sup>118</sup>The "full-time employee" requirement eliminates the possibility of a disbarred attorney working "part time" for a number of corporations with small claims.

<sup>119</sup>Of course, corporations must still appear by counsel if the claim is between \$300 and the maximum jurisdictional amount for small claims court of \$2,000. IND. CODE § 33-11.6-4-2 (1982).

<sup>120</sup>Act of Mar. 28, 1983, Pub. L. No. 239-1983, § 1, 1983 Ind. Acts 1542, 1542-56 (codified at IND. CODE §§ 23-1.5-1-1 to -5-2 (Supp. 1983)). The new Act is patterned, with refinements, on the Professional Corporation Supplement to the Model Business Corporation Act adopted by the Committee on Corporate Laws of the American Bar Association. 32 BUS. LAW. 289 (1976).

<sup>121</sup>General Professional Corporation Act, IND. CODE §§ 23-1-13-1 to -12 (1982) (repealed 1983); Professional Accounting Corporation Act, IND. CODE §§ 23-1-13.5-1 to -7 (1982) (repealed 1983); Professional Medical Corporation Act, IND. CODE §§ 23-1-14-1 to -22 (1982) (repealed 1983); Professional Dental Corporation Act, IND. CODE §§ 23-1-15-1 to -22 (1982) (repealed 1983).

<sup>122</sup>For example, the Indiana Medical Professional Corporation Act, the first professional corporation act to be enacted, provided that portions of the General Corporation Act apply to professional medical corporations "except where inconsistent with the provisions and purpose of this act." IND. CODE § 23-1-14-5 (1982). In other words, the General Corporation Act was incorporated by reference. A similar approach was taken when the Professional Dental Corporation Act was adopted in 1965. *Id.* § 23-1-15-5. However, in the General Professional Corporation Act, also adopted in 1965, the legislature adopted by reference the provisions of the Medical Professional Corporation Act relating to the applicability of the General Corporation Act. *Id.* § 23-1-13-11. In other words, a provision incorporating by reference, was incorporated by reference. The Professional Accounting Corporation Act was not so much a professional corporation act as statutory authority for general corporations to practice public accounting. *Id.* § 23-1-13.5-1. Of course, the new Act still provides that the Indiana General Corporation Act applies to professional corporations. In the event of a conflict between the two, the Professional Corporation Act controls. *Id.* § 23-1.5-2-1 (Supp. 1983).

professionals practicing on their own or in traditional partnerships could not enjoy the tax benefits, particularly with respect to pension plans, available to persons engaging in the corporate form of business.<sup>123</sup> However, the Tax Equity and Fiscal Responsibility Act of 1982<sup>124</sup> made substantial changes to the laws governing private pensions, reducing the impetus for professionals to incorporate for tax purposes. Thus, when the General Assembly was remedying the haphazard statutes enacted to give professionals tax breaks, the tax breaks were being reduced. This is not to say, however, that professionals would not wish to incorporate for non-tax reasons.<sup>125</sup> Furthermore, the Act even assists professionals currently incorporated who wish to dissolve the corporation by authorizing the conversion of a professional corporation into a general business corporation.<sup>126</sup>

It is only possible to briefly summarize the provisions of the new Act.<sup>127</sup> The Act has an extensive definition section including a description of professionals who may incorporate.<sup>128</sup> One significant feature of the new Act is that it permits various related professionals to join in one corporation. This does not mean that an attorney, an architect, and a doctor can form one professional corporation, but it does permit different types of health care professionals or architects and licensed land surveyors to incorporate.<sup>129</sup>

The new Act definitely improves the manner in which professional corporations may be run. For example, the Act now provides that the corporate secretary and treasurer need not be licensed.<sup>130</sup> This makes it easier for a sole practitioner to incorporate. A professional can now have his or her office manager or the corporation's regular attorney or accountant serve as the secretary and treasurer.

The Act also specifies in some detail the liability aspects of a cor-

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<sup>123</sup>See generally Kalish & Lewis, *Professional Corporations Revisited*, 28 TAX LAW. 471 (1975); Siegel, *The Utility of the Professional Corporation: A Rejoinder*, 29 TAX LAW. 265 (1976); Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353 (1958).

<sup>124</sup>Pub. L. No. 97-248, 96 Stat. 324 (1982).

<sup>125</sup>Existing professional corporations may accept the new Act to benefit from the rights and privileges by complying with specified requirements. IND. CODE § 23-1.5-4-4 to -7 (Supp. 1983).

<sup>126</sup>*Id.* § 23-1.5-4-2.

<sup>127</sup>See generally Simcox, *Update: Corporation, Securities Law*, 26 RES GESTAE, 600, 603-05 (1983).

<sup>128</sup>IND. CODE §§ 23-1.5-1-1 to -14 (Supp. 1983). There are basically five types of professionals who may incorporate: 1) accounting professionals; 2) architectural or engineering professionals, including licensed architects, landscape architects, and professional engineers or land surveyors (these professionals can incorporate under the Indiana General Professional Corporation Act, 31 Op. Att'y Gen. 96 (1973)); 3) attorneys; 4) health care professionals, including chiropractors, dentists, nurses, optometrists, pharmacists, physicians, podiatrists, psychologists and speech pathologists and audiologists; and 5) veterinarians.

<sup>129</sup>IND. CODE § 23-1.5-2-3(a) (Supp. 1983). This concept first appeared in the 1981 amendments to the Professional Medical Corporation Act. Act of May 5, 1981, Pub. L. No. 212, § 5, 1981 Ind. Acts 1615, 1616 (formerly codified at IND. CODE § 23-1-14-3 (1982)).

<sup>130</sup>IND. CODE § 23-1.5-2-4 (Supp. 1983).

porate professional practice. The negligent professional who provided the service is liable to the same extent as would be a sole practitioner,<sup>131</sup> and he or she is also liable for the conduct of employees of the corporation under his or her direction or control.<sup>132</sup> The corporation itself is liable for the negligence of its employees performing professional services within the scope of their employment or apparent authority.<sup>133</sup> *Birt v. St. Mary Mercy Hospital, Inc.*,<sup>134</sup> which held that members of a medical professional corporation were not liable for the malpractice of one of their colleagues, has been codified by Indiana Code section 23-1.5-2-6(d).<sup>135</sup> Under this provision, except as otherwise provided by statute or by rule of the licensing authority, the personal liability of a shareholder of a professional corporation is no greater than the liability of a shareholder of a general corporation. The relationship between the individual performing the professional services as an employee of a professional corporation and the client or patient is the same as if the individual performed such services as a sole practitioner.<sup>136</sup> The above relationship, as well as any privilege which may be obtained, is expressly extended to the corporation.<sup>137</sup>

The organizational structure of professional corporations has been changed by the new Act. Under the prior statute, all shareholders had to be licensed professionals, but now shares may be held by individuals who are licensed professionals, general partnerships in which partners are licensed professionals, professional corporations authorized to render professional services, and qualified trusts in which the trustees and beneficiaries are licensed professionals.<sup>138</sup> This will ease estate planning for professionals by permitting the formation of professional corporations where some shareholders are sole practitioners and others are employees of their own professional corporations.

One troublesome question for professional corporations is how to dispose of the shares of deceased or disqualified shareholders. The Act has detailed provisions relating to the repurchase of such shares and even establishes a judicial procedure for determining the price of the shares when not set by the articles, bylaws, or private agreement among the parties.<sup>139</sup> Proxies and voting trusts can now be utilized in professional

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<sup>131</sup>*Id.* § 23-1.5-2-6(a).

<sup>132</sup>*Id.* § 23-1.5-2-6(b).

<sup>133</sup>*Id.* § 23-1.5-2-6(c).

<sup>134</sup>175 Ind. App. 32, 370 N.E.2d 379 (1977). *See also* Ross v. Schubert, 388 N.E.2d 623 (Ind. Ct. App. 1979).

<sup>135</sup>IND. CODE § 23-1.5-2-6(d) (Supp. 1983). This provision reflects awareness of *Western Parks, Inc. v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978) and the Supreme Court's control over the practice of law. The Supreme Court imposes partnership liability on the shareholders of professional corporations formed to practice law. IND. R. ADMISS. & DISCP. 27(c).

<sup>137</sup>*Id.* § 23-1.5-2-7(b).

<sup>138</sup>*Id.* § 23-1.5-3-1.

<sup>139</sup>*Id.* §§ 23-1.5-3-2, -3.

corporations as long as the voting powers will be exercised by licensed professionals.<sup>140</sup>

The new Professional Corporation Act also contains numerous provisions relating to the names of professional corporations,<sup>141</sup> registration with the appropriate licensing authority,<sup>142</sup> annual reports,<sup>143</sup> changes in ownership,<sup>144</sup> and mergers and consolidations of professional corporations.<sup>145</sup> The Act even contains procedures under which a foreign professional corporation may be admitted to render professional services in Indiana.<sup>146</sup>

**4. Telephone Conference Calls.**—Another enactment worth noting is Public Law 244<sup>147</sup> which clarifies an ambiguity previously existing in Indiana Code section 23-1-2-11(h). In 1982, the General Assembly amended the General Corporation Act to permit directors of a corporation to attend board meetings by the use of telephone conference calls.<sup>148</sup> Apparently, however, the statute did not specify whether this type of call could substitute for an actual meeting. Public Law 244 amends the Act<sup>149</sup> to make it clear that a telephone conference call can be used in lieu of an actual meeting. Also, the General Assembly apparently determined that not authorizing telephone conference calls by directors of Indiana not-for-profit corporations was an oversight and amended another section of the Act<sup>150</sup> to authorize such calls among any or all of the directors or committees of not-for-profit corporations.

**5. Private Placement Exemption.**—Section two of Public Law 240<sup>151</sup> is important to an attorney with a securities practice. This law substan-

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<sup>140</sup>*Id.* § 23-1.5-3-4. Non-professionals who are the personal representatives of shareholders owning all the outstanding shares of a professional corporation are authorized to exercise voting rights and serve as directors and officers for purposes of dissolving the corporation or amending the articles to become a general corporation. *Id.* § 23-1.5-3-5. The prior professional corporation acts permitted non-professional personal representatives to dissolve such corporations. IND. CODE §§ 23-1-13-12, 23-1-14-22, 23-1-15-22 (1982) (repealed 1983).

<sup>141</sup>IND. CODE § 23-1.5-2-8 (Supp. 1983).

<sup>142</sup>*Id.* §§ 23-1.5-2-9, -10.

<sup>143</sup>*Id.* § 23-1.5-2-11.

<sup>144</sup>*Id.* § 23-1.5-3-6(b).

<sup>145</sup>*Id.* § 23-1.5-4-1.

<sup>146</sup>*Id.* §§ 23-1.5-5-1, -2.

<sup>147</sup>Act of Mar. 23, 1983, Pub. L. No. 244-1983, § 3, 1983 Ind. Acts 1599, 1606 (codified at IND. CODE § 23-1-2-11(h) (Supp. 1983)).

<sup>148</sup>Act of Feb. 24, 1982, Pub. L. No. 142, § 1, 1982 Ind. Acts 1050, 1054 (codified at IND. CODE § 23-1-2-11(h) (1982)). See generally Galanti, *Business Associations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 46-48 (1983).

<sup>150</sup>Act of Mar. 23, 1983 Pub. L. No. 244-1983, § 2, 1983 Ind. Acts 1599, 1602 (codified at IND. CODE § 23-7-1.1-10(g) (Supp. 1983)). Public Law 244 also defines a director of a not-for-profit corporation as a member of the managing board whether designated a director, trustee, manager, governor, or any other title. See IND. CODE § 23-7.1-1-2(1) (Supp. 1983). The purpose of this amendment was to make clear that the rights, duties, and responsibilities of directors under the Not-For-Profit Corporation Act apply to the individuals who manage the entity regardless of how they are designated.

<sup>151</sup>Act of Apr. 22, 1983, Pub. L. No. 240-1983, § 2, 1983 Ind. Acts 1559, 1565 (codified

tially changed the private placement registration exemption available under Indiana Code section 23-2-1-2(b).<sup>152</sup> Because of space constraints, only a brief summary of Public Law 240 is possible. Previously, the offer or sale of securities by the issuer was exempt from the registration requirements of the Indiana Securities Act<sup>153</sup> if there were no more than thirty-five purchasers; no general advertisements or solicitations were made; each purchaser gave a written representation that the securities were being acquired for investment purposes; and no commission or remuneration was paid or given for soliciting prospective buyers.<sup>154</sup>

The new private placement exemption basically follows the approach taken by the SEC in its recently promulgated Regulation D<sup>155</sup> and utilizes the concept of the "accredited investor." The Act defines accredited investors as persons who, because of their substantial personal income, net worth, or connection with the issuer, do not need or are less in need of the protections afforded by the registration requirements of the Securities Act, or are institutional investors well able to take care of themselves.<sup>156</sup>

Under the new section 23-2-1-2(b), no filing with the Indiana Securities Division is required for offerings where there are not more than thirty-five purchasers, including non-residents but excluding accredited investors, who are knowledgeable insiders, promoters, or family members of insiders or promoters; or not more than fifteen purchasers in Indiana who are accredited investors or knowledgeable purchasers; or not more than fifteen knowledgeable investors and the aggregate offering does not exceed \$250,000.<sup>157</sup> There are two other forms of private placements under section 23-2-1-2(b)(10). These placements require shortened notification of the Securities Commissioner. These exemptions apply to offerings between

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at IND. CODE § 23-2-1-2 (Supp. 1983)). See generally Simcox, *supra* note 127, at 600-01.

<sup>152</sup>IND. CODE § 23-2-1-2(b)(10) (Supp. 1983).

<sup>153</sup>*Id.* § 23-2-1-2 (1982).

<sup>154</sup>*Id.* § 23-2-1-2(b)(10). The payment of commissions or representations did not automatically preclude the availability of the exemption, but it could be disallowed by the Securities Commissioner. *Id.* § 23-2-1-2(b)(10)(iv).

<sup>155</sup>17 C.F.R. § 230.501—.506 (1983).

<sup>156</sup>IND. CODE § 23-2-1-1(r) (Supp. 1983).

<sup>157</sup>*Id.* § 23-2-1-2(b)(10)(G). In order for this exemption to apply, no advertising or general solicitation is permitted and the issuer must reasonably believe the investor is purchasing the securities for investment purposes. *Id.* § 23-2-1-2(b)(10)(B). Also, the exemption is available only if the purchasers have access to all material facts with respect to the securities by reason of their status. *Id.* § 23-2-1-2(b)(10)(C).

With respect to whether the issuer has a reasonable belief that an investor is purchasing the securities for investment purposes, section 23-2-1-2(b)(10)(C)(i), (ii) specifies that the basis for the belief may include a written representation signed by the purchaser that the acquisition is for investment purposes and that he is aware of any restrictions imposed on the transferability of the securities, and the placement of a legend on the securities that they have not been registered under the Indiana Securities Act and setting forth or referring to any restrictions on the transferability and sale of securities.

\$250,000 and \$500,000<sup>158</sup> and offerings in excess of \$500,000.<sup>159</sup> In both cases the prohibition against advertising or general solicitation and the investment purpose condition apply, and there must be no more than thirty-five purchasers plus any number of accredited investors.<sup>160</sup> The purchasers must be sophisticated and capable of evaluating the merits and risks of the prospective investment.<sup>161</sup>

For offerings that do not exceed \$500,000, a brief summary of the offering, including copies of any written materials and information on the issuer and persons involved with the issuer, and a consent to service of process must be filed with the Secretary of State.<sup>162</sup> This information also must be furnished to the purchasers. For offerings that exceed \$500,000, a written offering statement, and a consent to service of process must be filed.<sup>163</sup> This offering statement must set forth all material facts with respect to the securities.

The Securities Commissioner can disallow the exemption within ten days of a filing of a summary or an offering statement.<sup>164</sup> The issuer may make offers but not sales before and during this ten-day period if prospective purchasers are advised in writing that the offer is preliminary and subject to material change.<sup>165</sup> No enforceable offer to purchase the securities may be made by a prospective purchaser, and no consideration may be accepted or received from the purchaser, before the ten-day period expires or before any order disallowing the exemption is vacated.<sup>166</sup>

The approach taken by the General Assembly tracks SEC Regulation D to a considerable extent. It may be argued that it should have tracked the federal rule more closely. The approach taken, however, does lessen the registration requirements for many security offerings made in Indiana while still protecting the interests of Indiana residents. The bar can be thankful for this.<sup>167</sup>

*6. Indiana Business Takeover Offers Act.*—Hope springs eternal, and once again the Indiana Business Takeover Offers Act has been amended.<sup>168</sup> The General Assembly amended the introductory provision of the Act,

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<sup>158</sup>*Id.* § 23-2-1-2(b)(10)(E).

<sup>159</sup>*Id.* § 23-2-1-2(b)(10)(D).

<sup>160</sup>*Id.* § 23-2-1-2(b)(10)(A), (B).

<sup>161</sup>*Id.* § 23-2-1-2(b)(10)(C).

<sup>162</sup>*Id.* § 23-2-1-2(b)(10)(E).

<sup>163</sup>*Id.* § 23-2-1-2(b)(10)(D).

<sup>164</sup>*Id.* § 23-2-1-2(b)(10)(F).

<sup>165</sup>*Id.* § 23-2-1-2(b)(10)(F)(i).

<sup>166</sup>*Id.* § 23-2-1-2(b)(10)(F)(ii).

<sup>167</sup>Public Law 240 also repealed exemption for oil and gas leases formerly available under section 23-2-1-2(b)(13). Act of Apr. 22, 1983, Pub. L. No. 240-1983, § 2, 1983 Ind. Acts 1559, 1565 (repealing IND. CODE § 23-2-1-2(b)(13) (1982)). It also made some additional technical amendments clarifying certain definitions and administrative procedures and, not surprisingly, increasing certain fees. See IND. CODE §§ 23-2-1-2(c) to -2(e) (Supp. 1983).

<sup>168</sup>Act of Apr. 11, 1983, Pub. L. No. 242-1983, 1983 Ind. Acts 1592 (codified at IND. CODE § 23-2-3.1-0.5 (Supp. 1983)). See generally Simcox, *supra* note 127, at 602-03.

added in 1981, to "acknowledge" the emergence of a number of practices such as multiple proration pools and two-step transactions which are designed to make shareholders move quickly once a tender offer has been made lest they risk losing out on the offer, and to protect shareholders of Indiana corporations who allegedly have lost the benefit of takeover offers because they lack the sophistication and ability to secure those benefits.<sup>169</sup> The purpose clause was also amended to provide that the full disclosure and protection provided by the Act would be consistent with the United States and Indiana Constitutions.<sup>170</sup>

In a "multiple proration pool" all tendered shares are placed in a pool and a prorated number of shares are purchased from all tendering shareholders. Unfortunately, the small shareholder is often unaware of the offering until after early pools are filled and may be thrust in pools which offer a lower price or from which fewer shares are purchased. In a "two-step transaction," a lucrative offer may be made for a certain number of shares and then in a "second step" a lower price is offered to remaining shareholders. This device permits an offeror to acquire a controlling interest in a target company after which minority shareholders can be forced out at a substantially lower price.

The Takeover Offers Act was amended in an attempt to address these practices by introducing the term "substantially equivalent terms." This term is defined to mean the "terms under which the fair market value of the consideration offered [to] any offeree . . . are equal to the highest consideration offered in connection with a takeover offer to any other offeree."<sup>171</sup> The Act prohibits an offeror from making a takeover offer unless it complies with the Act's requirements.<sup>172</sup> Two new requirements have been added: section 23-2-3.1-6-5 prohibits takeover offers not made to all offerees holding the same class of equity securities on substantially equivalent terms,<sup>173</sup> and section 23-2-3.1-8.4 prohibits an offeror from acquiring equity securities of a class of a target company within two years of a takeover offer unless on substantially equivalent terms.<sup>174</sup>

Public Law 242 also amended the Act to define "offeror" as including the target company with respect to acquisition of its own equity securities and when it is controlled by or under common control with the offeror.<sup>175</sup> Although eliminating the exemption for a corporation purchasing its own securities is a decided improvement, the Act may still constitute an undue burden on interstate commerce which was the basis of the Supreme Court's

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<sup>169</sup>IND. CODE § 23-2-3.1-0.5(a) (1982 & Supp. 1983).

<sup>170</sup>*Id.* § 23-2-3.1-0.5(b).

<sup>171</sup>*Id.* § 23-2-3.1-1.

<sup>172</sup>*Id.* § 23-2-3.1-2.

<sup>173</sup>*Id.* § 23-2-3.1-6.5.

<sup>174</sup>*Id.* § 23-2-3.1-8.4.

<sup>175</sup>*Id.* § 23-2-3.1-1 (Supp. 1983). *See also* IND. CODE § 23-2-3.1-8.6(2) (1982) (amended 1983) (previously exempted target company's acquisition of its own shares).



decision in *Edgar v. MITE Corp.*,<sup>176</sup> striking down the Illinois Business Takeovers Act.

Courts, however, have ruled that neither a two-tier tender offer<sup>177</sup> nor a first-come, first-served tender offer<sup>178</sup> was in violation of federal tender offer regulations. It is possible that the Act may pass muster as a permissible indirect burden on interstate commerce to protect legitimate state interests.<sup>179</sup>

The prospects for the Act, however, are somewhat dimmed because prohibiting takeover offers in Indiana which do not comply with the Act may defeat a tender offer to residents of other states if the Indiana shares are needed to provide sufficient tendered shares. This was the basis of recent decisions striking down Oklahoma's takeover act.<sup>180</sup> Also, the provision barring acquisition of additional shares for a two-year period except on substantially equivalent terms might cause problems.<sup>181</sup> Virginia's takeover act,<sup>182</sup> attempting to regulate "creeping tender offers," was held to impose an undue burden on interstate commerce and hence was unconstitutional.<sup>183</sup> Shareholders would be benefited by the new Indiana provisions, but it is questionable if the benefit to Indiana shareholders would outweigh the negative impact on potential tender offers any more than Virginia's unsuccessful attempt to regulate open market purchases by an offeror did.

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<sup>176</sup>457 U.S. 624 (1982).

<sup>177</sup>*Radol v. Thomas*, 556 F. Supp. 586 (S.D. Ohio 1983).

<sup>178</sup>*Union Commerce Corp. v. Huntington Bancshares*, 556 F. Supp. 374 (N.D. Ohio 1982).

<sup>179</sup>*See City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd* 633 F.2d 56 (7th Cir. 1980). *See generally* Note, *Edgar v. MITE Corp.: The Death Knell for the Indiana Takeover Offers Act*, 16 IND. L. REV. 517 (1983) (analysis of the impact of *Edgar* on the Indiana Act).

<sup>180</sup>*Mesa Petroleum Co. v. Cities Servs. Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,064 (W.D. Okla. 1982), *aff'd*, 715 F.2d 1425 (10th Cir. 1983); *Occidental Petroleum Corp. v. Cities Services Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 (W.D. Okla. 1982).

<sup>181</sup>Section 23-2-3.1-8.4 does not seem to permit a modification of the terms of an offer to reflect any changed circumstances within the two-year period.

<sup>182</sup>VA. CODE § 13.1-528 to -541 (1978 and Supp. 1983).

<sup>183</sup>*Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983).





### III. Civil Procedure and Jurisdiction

WILLIAM F. HARVEY\*

#### A. Introduction

This Survey Article is limited to a discussion of those cases and amendments to trial rules which were distinctive in the year reviewed.<sup>1</sup> During the survey period, the Indiana Supreme Court decided a case of extraordinary significance concerning the relationship between Trial Rules 59 and 60. Pursuant to its inherent rule-making authority, the Indiana Supreme Court amended the following rules effective January 1, 1983: Trial Rules 53.1, 53.2, 53.3, 53.4, and 53.5 and Small Claims Rule 8(C).

#### B. Jurisdiction, Process, and Venue

1. *Personal Jurisdiction*.—In *Tietloff v. Lift-A-Loft Corp.*,<sup>2</sup> an Arkansas resident sought to enforce an Arkansas default judgment against Lift-A-Loft, an Indiana corporation. Lift-A-Loft collaterally attacked the

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<sup>1</sup>Although a review of the Federal Rules of Civil Procedure is beyond the scope of this Article, significant amendments to these rules were made during the survey period. Federal Rule of Civil Procedure 4 was amended effective February 26, 1983. See Sinclair, *New Act Makes Drastic Shifts In Federal Service of Process*, Nat'l L.J., Mar. 7, 1983, at 20, col. 3. Additionally, the United States Supreme Court promulgated amendments to the following Federal Rules of Civil Procedure effective August 1, 1983: 6, 7, 11, 16, 26, 52, 53, 67, 72, 73, 74, 75, and 76. For a brief review of the legislative history of these amendments, see Harvey, *Rules, Rulings for the Trial Lawyer*, 27 RES GESTAE 176, 176-77 (1983).

In addition, practitioners are advised to take special note of two cases decided after the survey period, *Mennonite Bd. of Missions v. Adams*, 103 S. Ct. 2706 (1983), and *Hughes v. County of Morgan*, 452 N.E.2d 447 (Ind. Ct. App. 1983). In *Mennonite Bd.*, the United States Supreme Court addressed the constitutional adequacy of notice of a proceeding to sell mortgaged property for nonpayment of taxes. Reversing the Indiana Court of Appeals, the Court held that the mortgagee is entitled to personal service or notice by mail. 103 S. Ct. at 2712. In *Hughes*, the Indiana Court of Appeals dismissed an appeal because the appellant failed to meet the Appellate Rule 2(C) time limits for the filing of a praecipe and a submission for pre-appeal conference. The court declared that as of July 1, 1983, the rule would be strictly enforced. 452 N.E.2d at 447. Appellate Rule 2(C), which applies only to appeals taken to the court of appeals, provides that upon the filing of a praecipe with the clerk of the trial court, the appellant shall have ten days in which to file a copy of the praecipe, the motion to correct errors and the ruling thereon, a statement of the nature of the case, and the judgment. The sanctions for failure to comply with this rule include assignment of attorney fees and costs or other appropriate action. See IND. R. APP. P. 2(C).

<sup>2</sup>441 N.E.2d 986 (Ind. Ct. App. 1982).

validity of the Arkansas judgment contending that the Arkansas state court lacked personal jurisdiction over it.<sup>3</sup> In construing Arkansas' long-arm statute, the court decided that the focus for determining minimum contacts should be on the contractual claim,<sup>4</sup> as opposed to the alleged tort,<sup>5</sup> which occurred in Indiana.<sup>6</sup> After examining Lift-A-Loft's course of conduct relating to the transaction underlying the lawsuit, the court concluded that Lift-A-Loft had sufficient minimum contacts with Arkansas to satisfy due process.<sup>7</sup> Therefore, the assertion of personal jurisdiction by the Arkansas state court over the Indiana corporation was not inconsistent with fair play and substantial justice.

Additionally, the court noted that Trial Rule 8(C) places the burden of proving by a preponderance of the evidence the affirmative defense of lack of personal jurisdiction on the defendant.<sup>8</sup> In short, Lift-A-Loft was required to prove that it had insufficient contacts with Arkansas to support the Arkansas court's assertion of personal jurisdiction. Applying minimum contacts analysis, the court of appeals held that Lift-A-Loft failed to meet that burden.<sup>9</sup>

2. *Service of Process.*—The requirements for service of process were clarified by several decisions during the survey period.<sup>10</sup>

The court of appeals considered an issue which had not been specifically addressed at the appellate level since 1854. In *Idlewine v. Madison County Bank & Trust Co.*,<sup>11</sup> the trial court refused to set aside a default judgment and a foreclosure sale in an action taken against a husband and wife. The issue on appeal was whether service of process was adequate when the wife was not served.

The appellee bank had brought suit to foreclose a mortgage on property owned by the husband and wife as tenants by the entireties. The clerk of the trial court issued a joint summons addressed to the husband

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<sup>3</sup>*Id.* at 988. Negotiations between the parties took place in Arkansas with an oral agreement being made either in Arkansas or Tennessee. Lift-A-Loft sent a letter to Tietloff in Arkansas arranging to pick up Tietloff's forklift. Thereafter, a Lift-A-Loft employee entered Arkansas to transport the forklift to Indiana for evaluation. Additionally, Lift-A-Loft paid for the return shipment of the forklift back to Arkansas. *Id.* at 987.

<sup>4</sup>The contractual claim alleged breach of the oral agreement between the parties, which included an obligation on Lift-A-Loft's part to exercise ordinary care and diligence in the maintenance of the plaintiff's property and to return it in good condition. *Id.* at 990.

<sup>5</sup>The tort claim was based on negligence in storing and caring for Tietloff's forklift. *Id.* at 988.

<sup>6</sup>*Id.* at 988 n.2.

<sup>7</sup>*Id.* at 990-91.

<sup>8</sup>*Id.* at 988. For further discussion of Trial Rule 8(C), see *infra* notes 29-36 and accompanying text.

<sup>9</sup>441 N.E.2d at 988.

<sup>10</sup>In addition to the cases discussed *infra*, see *Greene v. Lindsey*, 456 U.S. 444 (1982), and *Bowmar Instrument Corp. v. Maag*, 442 N.E.2d 729 (Ind. Ct. App. 1982) (service of process needed to acquire jurisdiction over a garnishee).

<sup>11</sup>439 N.E.2d 1198 (Ind. Ct. App. 1982).

and wife which was returned unclaimed.<sup>12</sup> A subsequent alias joint summons was then issued. One copy of the alias joint summons was delivered to the residence and one copy was sent by first class mail to the residence pursuant to Trial Rule 4.1(B). The husband received both summons and concealed them from his wife.<sup>13</sup>

The court of appeals, relying on *Hutchens v. Latimer*,<sup>14</sup> held that personal jurisdiction may not be acquired over a person unless and until a copy of the summons is properly served upon *that* person, or that person makes an appearance.<sup>15</sup> Specifically, one copy of a joint summons delivered to the residence where two parties to the suit reside, does not constitute proper service.<sup>16</sup>

The court also held that the saving effect of Trial Rule 4.15(F) is inapplicable when there is no notice or service upon the person or his agent.<sup>17</sup> No notice or service was effected upon the wife in this case. Thus, the clear implication of this case is that each defendant in a case shall be served and the person seeking service shall furnish the clerk with the requisite number of copies of the complaint and summons to effectuate individual service.

3. *Venue*.—In *Duncan v. Rogers*,<sup>18</sup> the court of appeals affirmed the trial court's refusal to transfer for improper venue. The plaintiff brought a tort action alleging that he had been assaulted and injured in Pike County during a teachers union bargaining session. Plaintiff, a resident of Henry County, commenced the action in Henry County. The defendants filed a motion to transfer for improper venue. The motion was supported by an affidavit which stated that most of the witnesses resided in Pike County, and only the plaintiff resided in Henry County.<sup>19</sup> The court of appeals held that both Pike and Henry Counties qualified as counties where the action could be commenced.<sup>20</sup>

Generally, Trial Rule 75(A)(5) provides that an action against a governmental organization may be brought in the county where the plaintiffs reside, where the governmental organization is located, or where the claim arose. In essence, the defendants were asking the court to "engraft upon the rule a further provision which would require the court to transfer the case, as between qualifying counties, to the most convenient forum in terms of the overall litigation."<sup>21</sup> The court declined to do so and concluded that venue was proper in Henry County.

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<sup>12</sup>See IND. R. TR. P. 4.11.

<sup>13</sup>439 N.E.2d at 1200.

<sup>14</sup>5 Ind. 67 (1854).

<sup>15</sup>439 N.E.2d at 1201.

<sup>16</sup>See IND. R. TR. P. 4.1.

<sup>17</sup>439 N.E.2d at 1201.

<sup>18</sup>444 N.E.2d 1255 (Ind. Ct. App. 1983).

<sup>19</sup>*Id.* at 1256.

<sup>20</sup>*Id.* at 1257.

<sup>21</sup>*Id.* Examining Trial Rule 4.4(C), the court also noted that no injustice resulted from

The case of *In re Goetcheus*<sup>22</sup> illustrates the effect of a motion for a change of judge under Trial Rule 76. In this case, a bank, as guardian for an individual, filed a change of venue from the judge after an intervenor's motion on objections to the bank's final report.<sup>23</sup> The court of appeals noted that a petition to remove a guardian has been expressly recognized as a civil action which entitles the guardian to seek a change of venue from the judge. Additionally, Trial Rule 76, in conjunction with Indiana Code section 34-2-12-1, provides for an automatic change of venue when the time limitations are satisfied.<sup>24</sup>

The court of appeals concluded that the trial court erred in refusing to grant the motion for change of venue and that it was divested of power to continue with the proceedings.<sup>25</sup> Accordingly, the court reversed, with instructions to sustain the motion for change of venue.

The Indiana Supreme Court in *State ex rel. First State Bank v. Porter Superior Court*<sup>26</sup> decided that multiple parties on one side of a lawsuit are not individually and independently entitled to an automatic change of venue under Trial Rule 76. After one of several defendants obtained a change of venue, the co-defendants applied for a second change of venue.<sup>27</sup> The court construed Trial Rule 76 as granting an automatic change of venue to a party, with co-parties considered as one party. The limit to one change of venue applies to all of the litigants on a side, not to each individual litigant.<sup>28</sup> Therefore, the co-defendants were not entitled to a second change of venue.

### C. Pleadings and Pre-Trial Motions

1. *Trial Rule 8(C): Affirmative Defenses.*—In *Indiana Bell Telephone Co. v. Mygrant*,<sup>29</sup> the Indiana Court of Appeals considered whether a general release executed without knowledge of the existence or severity of injuries is binding. Indiana Bell argued that Mygrant abandoned any claim for personal injuries when he executed the agreement. Further, it contended that the effect of the release is a question of law and that the law required that summary judgment be granted in favor of Indiana Bell.<sup>30</sup>

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the trial court's refusal to transfer the case pursuant to the doctrine of forum non conveniens. *Id.* at 1258.

<sup>22</sup>446 N.E.2d 39 (Ind. Ct. App. 1983).

<sup>23</sup>*Id.* at 40.

<sup>24</sup>*Id.* at 41.

<sup>25</sup>*Id.* at 42.

<sup>26</sup>447 N.E.2d 568 (Ind. 1983).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at 569. The decision in *First State Bank* does not affect the rule of *State ex rel. Crane Rentals, Inc. v. Madison Superior Court*, 266 Ind. 612, 365 N.E.2d 1224 (1977). In *Crane*, a second automatic change of venue was available where a second generation of defendants was added at a subsequent time.

<sup>29</sup>441 N.E.2d 481 (Ind. Ct. App. 1982).

<sup>30</sup>*Id.* at 483.

Conversely, Mygrant maintained that he had a viable cause of action for personal injury because the release was based on mutual mistake because both parties were unaware of Mygrant's personal injuries.<sup>31</sup> Mygrant requested rescission of the release or, alternatively, a narrow construction of the release as applying only to his property damages, not his personal injury damages.<sup>32</sup>

After considering pertinent case law and commentary, the court expanded "pure" contract law on mutual assent to consider the intent of the parties.<sup>33</sup> The court concluded that the parties' intent that the release be in full satisfaction of the injured party's claim should be treated as a question of fact to be ascertained from all the surrounding circumstances; therefore, summary judgment was inappropriate.<sup>34</sup> The court then enumerated several pertinent factors to be considered in determining the validity and extent of a release.<sup>35</sup>

While the majority of the court would look to the circumstances surrounding the settlement and release to determine actual mutual assent based on the intent of the parties, the dissent insisted that this approach undermines the purpose of a release—compromise and settlement. Instead, the dissent focused on determining whether there was a mutual mistake by the parties. Accordingly, once that determination is made, the validity of the release is a question of law.<sup>36</sup>

2. *Defense to Actions: Prematurity.*—In *Mattingly v. Whelden*,<sup>37</sup> the plaintiff filed an action for malicious prosecution on the same day a timely appeal of the underlying cause was perfected. The defendants' motion for summary judgment was granted because the malicious prosecution action had not matured.<sup>38</sup>

Prior to the adoption of the Indiana Rules of Trial Procedure, a premature action was attacked by a plea in abatement.<sup>39</sup> Trial Rule 7(C), which specifically abolished pleas in abatement, provides that "[a]ll objections and defenses formerly raised by such motions shall now be raised pursuant to Rule 12."<sup>40</sup> Because a premature action is not one of the defenses enumerated in Trial Rule 12(B),<sup>41</sup> it must be raised in a responsive pleading or by means of a summary judgment motion<sup>42</sup> as in this case.

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<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 486, 487.

<sup>34</sup>*Id.* at 487.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 488-89 (Hoffman, J., dissenting).

<sup>37</sup>435 N.E.2d 61 (Ind. Ct. App. 1982).

<sup>38</sup>*Id.* at 62.

<sup>39</sup>See *Middaugh v. Wilson*, 30 Ind. App. 112, 65 N.E. 555 (1902).

<sup>40</sup>IND. R. TR. P. 7(C).

<sup>41</sup>Of course, certain affirmative defenses listed in Trial Rule 8(C) may be raised under Trial Rule 12(B)(6). See, e.g., *Lacey v. Morgan*, 152 Ind. App. 119, 282 N.E.2d 344 (1972) (statute of frauds); *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 278 N.E.2d 295 (1972) (statute of limitations).

<sup>42</sup>IND. R. TR. P. 56.

Because the defense of prematurity does not concern the merits of a claim,<sup>43</sup> it is not a defense with *res judicata* effect.<sup>44</sup> Therefore, a judgment of dismissal based upon the prematurity of the asserted claim will not bar a timely action if a claim subsequently matures.

3. *Trial Rule 15: Amended and Supplemental Pleadings.*—

a. *Amendments.*—The decision in *Cato v. David Excavating Co.*<sup>45</sup> illustrates the substantial authority of a trial court to permit amendments to pleadings. The Indiana Supreme Court has previously declared that judicial policy in Indiana favors amendments to pleadings, regardless of context, and such amendments shall be made unless the opposing party shows that harm or prejudice will result.<sup>46</sup> In *Cato*, the trial court permitted the plaintiffs to answer a defendant's counterclaim on the day of trial. The counterclaim was filed in January, 1979, and trial occurred in 1981. On the day of trial, before evidence was introduced, defense counsel asked that all matters in the counterclaim be admitted. In response, the plaintiff's counsel asked the trial court to accept an oral denial of the counterclaim, which the trial court did.<sup>47</sup>

On appeal this procedure was affirmed as being consistent with Trial Rule 15(A) and compatible with Trial Rule 6(B)(2), which permits the court to grant extensions for responsive pleadings. Specifically, the court concluded that there was no showing of reversible error.<sup>48</sup>

b. *Relation back of amendments.*—In *Lamberson v. Crouse*,<sup>49</sup> the plaintiff amended a complaint to add another defendant after the two-year statute of limitations had run, which was shown on the face of the amended complaint. The plaintiff contended that the amendment was timely under Trial Rule 15(C); however, the trial court dismissed the amended complaint on a Trial Rule 12(B)(6) motion for failure to state a claim.<sup>50</sup> On appeal the court of appeals stated that as long as the named party or parties differ in any form after the amendment, then it is an amendment "changing the party" under Trial Rule 15(C).<sup>51</sup> The court found that the three conditions<sup>52</sup> for changing the party against whom

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<sup>43</sup>RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982).

<sup>44</sup>See *Kirkpatrick v. Stingley*, 2 Ind. 269, 273 (1850); see also *Powers v. Ellis*, 231 Ind. 273, 277, 108 N.E.2d 132, 134 (1952).

<sup>45</sup>435 N.E.2d 597 (Ind. Ct. App. 1982).

<sup>46</sup>See, e.g., *Criss v. Bitzegaio*, 420 N.E.2d 1221, 1223 (Ind. 1981); *Huff v. Travelers Indemnity Co.*, 266 Ind. 414, 419, 363 N.E.2d 985, 989 (1977); see also *State Farm Mutual Automobile Ins. Co. v. Shuman*, 175 Ind. App. 186, 192-93, 370 N.E.2d 941, 948 (1977). This judicial policy encourages litigants to bring all matters before the court. See *Cox v. Indiana Subcontractors Ass'n*, 441 N.E.2d 222, 225 (Ind. Ct. App. 1982).

<sup>47</sup>435 N.E.2d at 600.

<sup>48</sup>*Id.* at 602.

<sup>49</sup>436 N.E.2d 104 (Ind. Ct. App. 1982).

<sup>50</sup>*Id.* at 105.

<sup>51</sup>*Id.* at 106.

<sup>52</sup>The conditions are:

(1) [T]he claim asserted in the amended claim arose out of the conduct,

a claim is asserted, listed in Trial Rule 15(C), were present in this case; therefore, the amendment related back to the date of the original claim.<sup>53</sup>

Alternatively, the Trial Rule 12(B)(6) motion to dismiss was improper because “[w]hen no evidence has been heard or no affidavits have been submitted, a 12(B)(6) motion should be granted only where it is clear from the *face* of the complaint that under no circumstances could relief be granted.”<sup>54</sup> Although the face of the amended complaint indicated that the action was filed more than two years after the occurrence, a 12(B)(6) motion was inappropriate because it was not certain that the statute of limitations was a defense. Thus, the proper mechanism to challenge the amended complaint would be a summary judgment motion, or a 12(B)(6) motion to dismiss supplemented with affidavits or other materials which would convert the motion into a summary judgment motion.

4. *Trial Rule 41: Dismissal of Actions.*—a. *Pre-dismissal hearing.*—The Indiana Supreme Court, in *Rumfelt v. Himes*,<sup>55</sup> emphasized that Trial Rule 41(E) clearly requires a pre-dismissal hearing.<sup>56</sup> The trial court dismissed the plaintiff’s action without a hearing for failure to comply with the rules of civil procedure and the court’s orders.<sup>57</sup> The supreme court concluded that the court of appeals erred in affirming the trial court based on Trial Rule 73, and vacated the opinion.<sup>58</sup>

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transaction, or occurrence set forth in the original claim, and

(2) within the statute of limitations for the claim the party brought in by the amendment

a. received such notice of the institution of the action he will not be prejudiced in maintaining a defense on the merits, and

b. knew or should have known but for a mistake concerning identity of the proper party, the action would have been brought against him.

436 N.E.2d at 105-06 (citing IND. R. TR. P. 15(C)).

<sup>53</sup>436 N.E.2d at 106. Another case decided during the survey period, *Klingbeil Co. v. Ric-Wil, Inc.*, 436 N.E.2d 843 (Ind. Ct. App. 1982), presented a similar statute of limitations problem. However, the parties were clearly in the case before the limitations claim or a statute of limitations bar to the action arose.

<sup>54</sup>*State v. Rankin*, 260 Ind. 228, 231, 294 N.E.2d 604, 606 (1973), *appeal after remand*, 160 Ind. App. 703, 313 N.E.2d 705 (1974).

<sup>55</sup>438 N.E.2d 980 (Ind. 1982).

<sup>56</sup>Trial Rule 41 (E) provides in part:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case.

The *Rumfelt* decision was followed in *Yaksich v. Gastevich*, 440 N.E.2d 1138 (Ind. Ct. App. 1982). In *Yaksich*, the trial court dismissed the action because the plaintiff failed to amend the complaint pursuant to an order for a more definite statement. The court of appeals reversed pursuant to Trial Rule 41(E), for failure to provide the plaintiff a mandatory hearing on the motion to dismiss. The dismissal of an action pursuant to Trial Rule 41(E) is with prejudice unless the court’s order states otherwise. *See, e.g., Davidson v. American Laundry Machinery*, 431 N.E.2d 546 (Ind. Ct. App. 1982).

<sup>57</sup>438 N.E.2d at 982.

<sup>58</sup>*Id.* at 984.



Trial Rule 73, which allows the trial court to expedite its business by directing the submission and determination of a motion without an oral hearing, is "a statement of policy by the [Indiana] Supreme Court and not a license to avoid and circumvent the clear, explicit mandates of its rules which are designed to assure justice to the parties."<sup>59</sup> Trial Rule 41(E), explicitly requiring a hearing on a motion to dismiss, controls over a general rule (Trial Rule 73) on the same subject. The dissenting opinion in *Rumfelt* stated that the lower courts should not be overruled because the plaintiff had an opportunity to be heard by submitting pleadings in opposition to the trial court's proposed action.<sup>60</sup>

*b. Reinstatement.*—In *Lyerson v. Hogan*,<sup>61</sup> the court of appeals addressed the issue of whether a party is entitled to notice of a motion to reinstate after a Trial Rule 41(E) dismissal when that party had not appeared in the action but did have a meritorious defense. The action was commenced in 1973, and the defendant was duly served. The defendant did not appear or plead until 1981. However, in 1975 the action was placed on the call docket and dismissed pursuant to Trial Rule 41. The action was then reinstated by the plaintiff on oral motion. No notice of the reinstatement action was sent to the defendant. A default judgment was entered against the defendant and proceedings supplemental were instituted in 1981.<sup>62</sup>

The court of appeals held that the defendant was not entitled to notice of the motion to reinstate under Trial Rules 41(E) and (F) because those rules did not so provide.<sup>63</sup> The court further observed that notice under Trial Rule 55(B) is required only when the party against whom judgment by default is sought has appeared in the action.<sup>64</sup> Additionally, the court held that a good defense does not alone entitle the defendant to relief from the default, and that presentation of Trial Rule 60(B) grounds to set aside the judgment in the first instance must also be shown.<sup>65</sup>

5. *Trial Rule 56: Summary Judgment.*—*a. Supporting materials.*—Several cases decided during the survey period address the problem of materials which must support a motion for summary judgment. In *Freson v. Combs*,<sup>66</sup> the court of appeals discussed the adequacy of supporting affidavits and other materials for a summary judgment motion. The defendant moved for summary judgment but failed to support the motion with affidavits, a transcript, or other evidentiary materials as contemplated by

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<sup>59</sup>*Id.* at 983 (quoting *Rumfelt v. Himes*, 427 N.E.2d 470, 474 (Ind. Ct. App. 1981) (Staton, J., dissenting), *vacated*, 438 N.E.2d 980 (Ind. 1982)).

<sup>60</sup>438 N.E.2d at 984 (Prentice, J., dissenting).

<sup>61</sup>441 N.E.2d 683 (Ind. Ct. App. 1982).

<sup>62</sup>*Id.* at 684-85.

<sup>63</sup>*Id.* at 686.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 687.

<sup>66</sup>433 N.E.2d 55 (Ind. Ct. App. 1982).

Trial Rules 56(C) and (E). One issue sought to be raised in the motion was the defense of res judicata.<sup>67</sup> The court of appeals stated that the failure to support a motion for summary judgment based upon the defense of res judicata with a certified transcript of the prior judgment is fatal, even though the attorney for the moving party filed an affidavit to that effect.<sup>68</sup> The court observed that materials submitted in support of a motion for summary judgment must be in the form intended, and that unsworn commentary by an attorney does not comply with the rule and will not be considered by the court.<sup>69</sup> Further, a brief filed in support of a summary judgment motion does not comply with the rule, and will not be considered,<sup>70</sup> nor will other unsworn statements or uncertified exhibits qualify.<sup>71</sup>

Only when a motion for summary judgment is supported by an affidavit made on personal knowledge setting forth facts which are admissible into evidence and affirmatively showing that the affiant is competent to testify to matters therein must the adverse party respond by an affidavit setting forth facts to the contrary in order to establish the existence of a genuine issue for trial.<sup>72</sup> Similarly, the court in *Coghill v. Badger*<sup>73</sup> held that affidavits used pursuant to Trial Rule 56(E) should present admissible evidence.<sup>74</sup> Recognizing federal court precedents, the court of appeals further held that the affidavits should follow substantially the same form as if the affiant were giving testimony in court,<sup>75</sup> and portions of affidavits which set forth conclusory facts or conclusions of law cannot be used to support or oppose a motion for summary judgment.<sup>76</sup> The court observed that a trial court must disregard, in a judgment matter, any inadmissible information in the affidavits.<sup>77</sup>

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<sup>67</sup>*Id.* at 58-59.

<sup>68</sup>*Id.* at 59 (citing *Lukacs v. Kluessner*, 154 Ind. App. 452, 290 N.E.2d 125 (1972)).

<sup>69</sup>433 N.E.2d at 59 (citing *Swartzell v. Herrin*, 144 Ind. App. 611, 248 N.E.2d 38 (1969)).

<sup>70</sup>433 N.E.2d at 59 (citing *Schill v. Choate*, 144 Ind. App. 543, 247 N.E.2d 688 (1969)).

<sup>71</sup>433 N.E.2d at 59 (citing *Pomerence v. National Life & Accident Ins. Co.*, 143 Ind. App. 472, 241 N.E.2d 390 (1968); 3 W. HARVEY, INDIANA PRACTICE § 56.5, at 556 (1970)).

<sup>72</sup>433 N.E.2d at 59.

<sup>73</sup>430 N.E.2d 405 (Ind. Ct. App. 1982).

<sup>74</sup>*Id.* at 406. *See also* *Carroll v. Lordy*, 431 N.E.2d 118 (Ind. Ct. App. 1982) (conclusions and opinion are no longer per se excluded at trial or in affidavits submitted with a motion for summary judgment; therefore, the trial court has discretion to permit such evidence).

<sup>75</sup>430 N.E.2d at 406 (citing *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949); *Universal Film Exchanges, Inc.*, 37 F.R.D. 4 (S.D.N.Y. 1965); *Seward v. Nisson*, 2 F.R.D. 545 (D. Dela. 1942)).

<sup>76</sup>430 N.E.2d at 406 (citing *Bsharah v. Eltra Corp.*, 394 F.2d 502 (6th Cir. 1968); *Algear v. United States*, 252 F.2d 519 (5th Cir. 1958); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738 (1973)).

<sup>77</sup>430 N.E.2d at 407.

b. *Creation of factual issues.*—The Indiana Supreme Court, in *Gaboury v. Ireland Road Grace Brethren, Inc.*,<sup>78</sup> addressed a question of first impression, whether a trial court may assess a witness' credibility on a motion for summary judgment.<sup>79</sup> The plaintiff commenced a tort action to recover for injuries sustained in a motorcycle accident which occurred when the plaintiff entered a driveway owned by defendant church and struck a cable. The plaintiff's deposition indicated that he was aware of or knew of the church property and intended to turn there. However, in an affidavit opposing defendant's motion for summary judgment, the plaintiff stated that he could not ascertain where the end of the road was located and that he was not aware he had entered the church property.<sup>80</sup>

The specific issue presented was whether an issue of fact was created when the plaintiff's affidavit differed from statements made in his deposition, thus preventing the entry of summary judgment for the defendant. The supreme court held that issues of fact cannot be created in this manner, stating that "contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant."<sup>81</sup>

c. *Procedural requirements.*—In *Midwest National Gas Corp. v. Locke Stove Co.*,<sup>82</sup> the trial court entered summary judgment in favor of one defendant without setting a time for hearing on the motion. One of the issues raised on appeal was whether the trial court erred in not setting a time for hearing as required by Trial Rule 56(C).<sup>83</sup>

The appellee argued that no error could be raised because the plaintiff failed to request a hearing on the motion as required by the Clark Circuit Court local rules.<sup>84</sup> The court of appeals held that the local rule was inconsistent with Trial Rule 56(C) and that under Trial Rule 81, as recently interpreted in *Otte v. Tessman*,<sup>85</sup> local courts cannot have rules inconsistent with the Indiana Rules of Trial Procedure.<sup>86</sup>

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<sup>78</sup>446 N.E.2d 1310 (Ind. 1983).

<sup>79</sup>*Id.* at 1314.

<sup>80</sup>*Id.* at 1312.

<sup>81</sup>*Id.* at 1314 (quoting *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 8, 249 S.E.2d 727, 732 (1978)).

<sup>82</sup>435 N.E.2d 85 (Ind. Ct. App. 1982).

<sup>83</sup>*Id.* at 86.

<sup>84</sup>*Id.* at 86-87.

<sup>85</sup>426 N.E.2d 660 (Ind. 1981). For a full discussion of the case, see Harvey, *Civil Procedure and Jurisdiction, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 57, 66 (1983).

<sup>86</sup>435 N.E.2d at 87. See also *Armstrong v. Lake*, 447 N.E.2d 1153 (Ind. Ct. App. 1983) (Marion County Local Rule 14(A), requiring a six-person jury, is contrary to Trial Rule 48, allowing juries of less than twelve persons). The legislature recently enacted a provision which provides for a six-member jury in all civil cases. See IND. CODE § 34-1-20.5-1 (Supp. 1983).

### D. Parties and Discovery

1. *Trial Rule 23: Class Actions.*—The Indiana Supreme Court expansively interpreted the trial court's authority to superintend a class action under Trial Rule 23 in *State ex rel. Harris v. Scott Circuit Court*.<sup>87</sup> The specific question raised was whether a trial court has discretionary authority under Trial Rule 23 to appoint counsel to represent absent class members. The case arose in an original action seeking a mandate and prohibition against a trial court which the Indiana Supreme Court denied.

Relying on cases interpreting Federal Rule 23,<sup>88</sup> the court held that the trial judge has wide discretion to assure adequate representation. Thus, a trial court may appoint separate counsel to protect the interests of absent class members and may also appoint additional counsel to represent the interests of subclasses in a class action litigation.<sup>89</sup> Therefore, the supreme court sustained the appointment of counsel to represent approximately 7,000 absent class members over the objection of counsel who represented the nine named plaintiffs.<sup>90</sup>

2. *Trial Rule 24: Intervention Requirement.*—In *Hepp v. Hammer*,<sup>91</sup> the court of appeals considered whether a nonparty may appear and defend on behalf of a named defendant, that is, whether a nonparty to an action may enter a special appearance to challenge the trial court's jurisdiction over the named defendant. In this medical malpractice action, counsel for the defendant's insurance carrier entered a special appearance solely for the purpose of quashing the summons by publication and dismissing the cause, which the trial court permitted.<sup>92</sup> The court of appeals reversed, pointing out that the attorney entered an appearance for the insurance company, rather than on behalf of the defendant, that his representation did not change, and that the insurance company was not a party to the case.<sup>93</sup>

The court noted that the trial rules provide only one method by which a nonparty may become an active litigant in an action, which method is established in Trial Rule 24.<sup>94</sup> A nonparty cannot appear and defend

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<sup>87</sup>437 N.E.2d 952 (Ind. 1982).

<sup>88</sup>In *Skalbania v. Simmons*, 443 N.E.2d 352, 357 (Ind. Ct. App. 1982), the court stated that federal cases decided under Federal Rule 23 are persuasive authority in interpreting Trial Rule 23.

<sup>89</sup>437 N.E.2d at 953 (citing *Cullen v. New York State Civil Service Comm'n*, 566 F.2d 846 (2d Cir. 1977); *Howard v. McLucas*, 87 F.R.D. 704 (M.D. Ga. 1980); *Esler v. Northrop Corp.*, 86 F.R.D. 20 (W.D. Mo. 1979); *Armstrong v. O'Connell*, 416 F. Supp. 1325 (E.D. Wis. 1976); 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1765 (1972)).

<sup>90</sup>437 N.E.2d at 954.

<sup>91</sup>445 N.E.2d 579 (Ind. Ct. App. 1983).

<sup>92</sup>*Id.* at 580-81.

<sup>93</sup>*Id.* at 581.

<sup>94</sup>*Id.*

without any other showing in the record.<sup>95</sup> The insurance company did not file a petition to intervene in the case. Thus, the trial court erred in not sustaining the plaintiff's motion to strike the insurance company's appearance and all the pleadings.<sup>96</sup>

3. *Discovery Rules.*—a. *Trial Rule 30: Deposition on oral examination.*—i. *Attorney's deposition.* In a will contest action, *In re Estate of Niemiec*,<sup>97</sup> the court of appeals considered whether an attorney who had formerly represented one of the parties could be required to give deposition testimony involving the testator's affairs. The trial court entered a protective order under Trial Rule 26(C) against the taking of the deposition. The court of appeals reversed the trial court on that issue, holding that the attorney was obliged to give deposition testimony under Trial Rules 30 and 45, even though the client was a party to the litigation.<sup>98</sup> The court noted that Indiana Code section 34-1-14-5<sup>99</sup> and Disciplinary Rule 4-101(B)<sup>100</sup> do not prohibit taking an attorney's deposition. Rather, an attorney must simply refrain from testifying during his deposition as to confidential communications and advice given to clients.<sup>101</sup> Additionally, a party is not required to show good cause for taking an attorney's deposition; good cause is only required under Trial Rule 26 for the issuance of a protective order.<sup>102</sup>

ii. *Notice.* In the criminal case of *Ryan v. State*,<sup>103</sup> the prosecution argued against the admission of a deposition into evidence because the State was not given a reasonable opportunity to be present when the deposition was taken. The State argued that only twenty-seven hours notice

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<sup>95</sup>The court reiterated the meaning of an amicus curiae appearance in Indiana. The court observed that an amicus is an advisor to the court, is not a party to the suit, and has no control over it. The amicus has no rights in the matter and cannot file a pleading or a motion of any kind, cannot reserve or make an exception to any ruling of the trial court, and cannot prosecute an appeal. In short, according to Indiana law, an amicus curiae can do nothing other than give advice to the court, and no party to the action has a cause to complain if the court grants to this stranger the privilege of being heard, because no action of the amicus can affect the legal rights of the party to the action. *Id.* at 581-82.

<sup>96</sup>*Id.* at 582.

<sup>97</sup>435 N.E.2d 570 (Ind. Ct. App. 1982).

<sup>98</sup>*Id.* at 572.

<sup>99</sup>IND. CODE § 34-1-14-5 (1982) provides in pertinent part: "The following persons shall not be competent witnesses: . . . Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases."

<sup>100</sup>MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) provides:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

<sup>101</sup>435 N.E.2d at 572.

<sup>102</sup>*Id.*

<sup>103</sup>431 N.E.2d 115 (Ind. 1982).

was given for the taking of the deposition in Tennessee, which was insufficient.<sup>104</sup>

The supreme court agreed and held that twenty-seven hours notice of a deposition to be taken in Tennessee is not reasonable notice as required by Trial Rule 30(B).<sup>105</sup> The court stated that the party entitled to notice of a deposition must have time to make arrangements for traveling to the place of the deposition and to seek a protective order if necessary.<sup>106</sup> Such time was not afforded here, and the court concluded that the trial court did not abuse its discretion in barring the use of the deposition.

In *Front v. Lane*,<sup>107</sup> neither the defendant nor the defense counsel appeared for a deposition taken in the case. At least one week before the scheduled deposition, the defendant was informed of the proposed deposition by his attorney. The defense attorney withdrew from the case before the deposition, so the plaintiff's attorney sent written notice of the deposition directly to the defendant. The notice, however, was not received until after the deposition was taken.<sup>108</sup>

The defendant later argued that the plaintiff should not have been permitted to use the deposition at trial because the defendant did not personally receive prior written notice. The court of appeals disagreed, holding that it would reverse a trial court's admission of a deposition only for an abuse of discretion.<sup>109</sup> The court also observed that the defendant did not deny that he had actual notice at least one week before the deposition was taken.<sup>110</sup> The defendant could not allege or prove that he was misled even though Trial Rule 30(B)(1) requires reasonable written notice to each party of the taking of a deposition. The court observed that the purpose of the discovery rules, allowing liberal discovery procedure, was accomplished and held that the trial court did not err in admitting the deposition.<sup>111</sup>

b. *Trial Rule 32: Use of deposition in court proceedings.*—The decision in *City of Indianapolis v. Swanson*<sup>112</sup> addressed the meaning of the phrase "managing agent" in Trial Rule 32(A)(2). The defendant City objected because the plaintiff did not show that the witness was a managing agent under this trial rule or was unavailable for trial. The court of appeals stated that the pertinent inquiry to determine whether a person serves as a managing agent for a deposition is not the person's title but the

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<sup>104</sup>*Id.* at 116.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>443 N.E.2d 95 (Ind. Ct. App. 1982).

<sup>108</sup>*Id.* at 98.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.*

<sup>112</sup>436 N.E.2d 1179 (Ind. Ct. App. 1982).

function performed in furtherance of the party's activities and interests.<sup>113</sup> An individual is deemed a managing agent under the rule only if that person has a general power to exercise his judgment and discretion in dealing with certain matters of the corporation or principal.<sup>114</sup>

The court held that the deposition should not have been admitted on the ground that the deponent was a managing agent because the witness lacked managerial discretion to execute his ideas.<sup>115</sup> In this particular instance, the witness was instructed only to investigate the scene, report to his superiors with facts and recommendations, and then implement the decisions of his superiors. Thus, the key to "managing agent" appears to be managerial discretion.

The Indiana Supreme Court has held that before a trial court can consider the testimony found in a deposition, in ruling on motions before or during trial, the deposition must be published.<sup>116</sup> An important qualification to the publication rule developed in *South v. Colip*<sup>117</sup> in a discussion about a motion to publish.

Trial Rule 30(E)(4) provides, generally, that in the event a deposition is not returned to the officer within 30 days after it is submitted to the witness, a certificate of that fact shall be filed with the court along with the deposition. In that event, any party may use a copy of the deposition as if the original had been signed by the witness. *South v. Colip* appears to conclude that when a deposition has not been returned at the time a motion to publish is filed, then the deposition need not have been filed in order to be used.<sup>118</sup> Thus, Trial Rule 30(E)(4) affects the use of a deposition in court proceedings and the publication requirements which are established by case law.

*c. Trial Rule 37: Sanctions.*—In the criminal case of *Glover v. State*,<sup>119</sup> the trial court, over the defendant's objections, refused to exclude the testimony of two witnesses who failed to appear for a deposition. The Indiana Supreme Court observed that Trial Rules 30 and 31 provide for the taking of depositions of witnesses and a deposition upon oral examination; that both provide that the attendance of a witness may be compelled by subpoena pursuant to Trial Rule 45(D); and that an individual may be held in contempt under Trial Rule 45(F) for failure to obey a subpoena.<sup>120</sup> The court reasoned that the defendant had an oppor-

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<sup>113</sup>*Id.* at 1184.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

<sup>116</sup>*Augustine v. First Federal Sav. & Loan Ass'n*, 270 Ind. 238, 240-41, 384 N.E.2d 1018, 1020 (1979). Publication is defined as "the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court." *Id.* at 240, 384 N.E.2d at 1020 (quoting *Swartzell v. Herrin*, 144 Ind. App. 611, 617-18, 248 N.E.2d 38, 42 (1969)).

<sup>117</sup>437 N.E.2d 494 (Ind. Ct. App. 1982).

<sup>118</sup>*Id.* at 497. See also *Jarvis v. State*, 441 N.E.2d 1, 6-7 (Ind. 1982).

<sup>119</sup>441 N.E.2d 1360 (Ind. 1982).

<sup>120</sup>*Id.* at 1362-63.

tunity to compel the witnesses to attend the deposition but did not take full advantage of the available methods to compel the witnesses' attendance.<sup>121</sup> Thus, the defendant's failure to avail himself of all available processes precluded the discretionary imposition of sanctions.

In a case illustrating the cogent sanctions available under Trial Rule 37, the United States Supreme Court, in *Insurance Corp. of Ireland v. Compagnie des Bauxites*,<sup>122</sup> decided that Federal Rule 37(b)(2) may be used to support a finding of personal jurisdiction when the defendant has failed or refused to comply with certain discovery orders concerning the facts relating to personal jurisdiction in the action. The plaintiff brought a diversity action against several insurance companies who raised the defense of lack of personal jurisdiction. The plaintiff attempted to use discovery to establish facts relating to personal jurisdiction, but the defendants repeatedly failed to comply with the trial court's orders for production of requested information relevant to the jurisdictional issue. Eventually, the district court entered an order pursuant to Federal Rule 37(b)(2)(A) that, because of the repeated failure to comply with the discovery orders, the court did acquire personal jurisdiction.<sup>123</sup>

The Supreme Court reasoned that personal jurisdiction arose from the due process clause and necessarily involved an "individual liberty interest."<sup>124</sup> Therefore, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be precluded or estopped from raising the issue.<sup>125</sup> The obstreperous conduct of the defendants in failing to comply with the discovery orders which would have enabled the court to decide the jurisdictional issues precluded this defense. Otherwise, a defendant could avoid litigation by simply refusing to disclose information necessary for finding personal jurisdiction.

The court of appeals, in *Hosts, Inc. v. Wells*,<sup>126</sup> discussed the mechanisms which must be utilized for an award of attorney's fees for abuse of discovery. Suit was brought on a promissory note in which there was no provision authorizing the recovery of attorney's fees upon default.<sup>127</sup> The trial court granted summary judgment to the creditors and awarded \$1,800 in attorney's fees and interest at the statutory rate. The court of appeals noted that Indiana has adhered to the general rule that, absent an express agreement or a special statute, a successful litigant is not entitled to an award of attorney's fees.<sup>128</sup> In a footnote and over strong dissent, the court further observed that there was no motion in the trial court for an award of attorney's fees by the plaintiffs, nor was a hearing

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<sup>121</sup>*Id.* at 1363.

<sup>122</sup>456 U.S. 694 (1982).

<sup>123</sup>*Id.* at 699.

<sup>124</sup>*Id.* at 702.

<sup>125</sup>*Id.* at 704.

<sup>126</sup>443 N.E.2d 319 (Ind. Ct. App. 1982).

<sup>127</sup>*Id.* at 320.

<sup>128</sup>*Id.* at 321.



held as contemplated by Trial Rule 37(A)(4).<sup>129</sup> The court of appeals reversed the award of attorney's fees because the request was made for the first time in a motion to correct error. The better procedure is to request attorney's fees according to the requirements set forth in Trial Rule 37(A)(4).<sup>130</sup>

### E. Trials and Judgments

1. *Voir Dire Examination*.—In *Barnes v. State*,<sup>131</sup> several questions asked in voir dire were at issue. An inquiry by the prosecuting attorney suggested that the defendant or some of the witnesses in a murder case were homosexuals. The prospective jurors were asked if that would preclude them from fairly judging the case. The defense counsel later asked one juror whether all human beings share "pet peeves of one kind or another" and whether that would preclude fair judgment.<sup>132</sup>

The comments of the Indiana Supreme Court on these questions are significant because they go beyond the specific question raised. The court stated that an individual's "personal habits or characteristics, as well as questions of race, religion, creed and politics" can raise questions regarding impartiality.<sup>133</sup> It is not improper to ask prospective jurors if their own personal feelings could be influenced by certain facts.<sup>134</sup> The purpose of this type of procedure is to assure the parties that the jury is impartial and unprejudiced.<sup>135</sup>

2. *Small Claims—Jurisdictional Limitation on Transfer*.—In *Clark v. Richardson*,<sup>136</sup> an action was commenced in small claims court and subsequently transferred to the municipal court, where the defendant demanded a jury trial. The judgment in the municipal court was in the plaintiffs' favor for \$2,560.06 which exceeded the \$1,500 jurisdictional limit then imposed upon the small claims court.<sup>137</sup> Although the defendant argued that it was error for the court to award an amount in excess of the limits of the court in which the claim originated, the court of ap-

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<sup>129</sup>*Id.* n.1.

<sup>130</sup>IND. R. TR. P. 37(A)(4) provides in part:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

<sup>131</sup>435 N.E.2d 235 (Ind. 1982).

<sup>132</sup>*Id.* at 237.

<sup>133</sup>*Id.* at 238.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>444 N.E.2d 868 (Ind. Ct. App. 1983).

<sup>137</sup>*Id.* at 869, *See* IND. CODE § 33-11.6-4-2 (1982) (since amended to permit claims

peals held that the jurisdictional limit of the receiving court, rather than the originating court, applies.<sup>138</sup>

3. *Declaratory Judgment*.—In *General Discount Corp. v. Weiss Machinery Corp.*,<sup>139</sup> the parties entered into an agreed judgment; however, their dispute continued. One party filed a petition for declaratory relief for an interpretation of the agreed judgment, which the trial court permitted.<sup>140</sup>

The court of appeals majority reasoned that a declaratory judgment action was appropriate because an agreed judgment is contractual in nature. Thus, the agreed judgment is not appealable because it does not represent the judgment of the court, which simply performs the ministerial duty of recording the agreement of the parties.<sup>141</sup>

The strong dissenting opinion objected, reasoning that the effect of the declaratory judgment action was a collateral attack upon a final judgment. Citing precedent to the effect that an agreed judgment cannot be appealed, the dissent asserted that a declaratory judgment action was not available for a collateral attack ostensibly to interpret an agreed judgment.<sup>142</sup> Rather, the party should have appealed under Trial Rule 60(B)(7).

#### F. Appeals

1. *The Relationship Between Trial Rules 59 and 60*.—In *Seibert Oxidermo, Inc. v. Shields*,<sup>143</sup> the Supreme Court of Indiana rendered an opinion of extraordinary significance and resolved a conflict among the district courts of appeals over the proper procedure to challenge a default entry and a default judgment.<sup>144</sup>

The plaintiff brought a damage action for \$760,000 against defendant Siebert Oxidermo. The defendant failed to answer. After the entry of default and the default judgment, a hearing was held on damages, and \$760,000 was awarded. The defendant then entered an appearance and moved to set aside the default judgment on the basis of excusable neglect. After a hearing, the trial court denied the motion and entered findings of fact and conclusions of law. A motion to correct error was filed and eventually denied. The defendant filed numerous motions to set

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not exceeding \$2,000 by Act of Mar. 23, 1981, Pub. L. No. 284, § 2, 1981 Ind. Acts 2298, 2298).

<sup>138</sup>*Id.* at 869. As a general matter, effective January 1, 1983, Small Claims Rule 8(C) was amended to require a corporation to appear by counsel only for claims over three hundred dollars (\$300.00). Previously, a corporation was required to be represented by an attorney in small claims court regardless of the amount of the claim.

<sup>139</sup>437 N.E.2d 145 (Ind. Ct. App. 1982).

<sup>140</sup>*Id.* at 147.

<sup>141</sup>*Id.* at 151.

<sup>142</sup>*Id.* (Staton, J., dissenting).

<sup>143</sup>446 N.E.2d 332 (Ind. 1983).

<sup>144</sup>See generally Note, *Trial Rules 59 and 60(B)—Clearing the Murky Waters of Post-judgment Relief?* 16 IND. L. REV. 539 (1983), which is an excellent discussion of this problem.

aside the default, and upon denial of each, filed a motion to correct error.<sup>145</sup> The defendant then filed a timely praecipe.<sup>146</sup>

The Indiana Supreme Court, after both parties sought transfer, exhaustively reviewed the area and the court of appeals opinions. The court held that

the proper procedure in the Indiana Rules of Trial Procedure for setting aside an entry of default or grant of default judgment thereon is to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the aggrieved party may then file a Rule 59 Motion to Correct Error alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the Motion to Correct Error.

. . . [W]here a judgment has been granted after an entry of default, Rule 55(C) and 60(B), when read together, clearly allow a Rule 60(B) motion to be filed to begin the attempt to set aside the default judgment at any time within one year after that judgment has been granted, *including during the first sixty [60] days thereafter*.<sup>147</sup>

The court rendered important interpretations concerning the use of Trial Rule 60(B) motions to raise issues on appeal after a motion has been filed challenging the entry of a default judgment. In this case several Trial Rule 60(B) motions were filed. One question raised in a subsequent Trial Rule 60(B) motion concerned excessive damages. The supreme court found that the issue should have been raised in the first Trial Rule 60(B) motion and in the motion to correct error which was filed subsequent to the denial of the first Trial Rule 60(B) motion.<sup>148</sup> Because Oxidermo failed to raise the issue initially, the court of appeals erred in addressing the issue of damages in its opinion, when the only errors saved for appeal were those raised in the first Trial Rule 60(B) motion and the ac-

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<sup>145</sup>See the procedural history set out in the opinion. 446 N.E.2d at 333.

<sup>146</sup>*Id.* at 333-34.

<sup>147</sup>*Id.* at 337 (emphasis added). In so holding, the court expressly overruled a number of court of appeals decisions. *Mathis v. Moorehouse*, 433 N.E.2d 814 (Ind. Ct. App. 1982); *Sowers v. Sowers*, 428 N.E.2d 245 (Ind. Ct. App. 1981); *Dawson v. St. Vincent Hosp. & Health Care Center*, 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re Marriage of Robbins*, 171 Ind. App. 509, 358 N.E.2d 153 (1976). *Pre-Finished Moulding & Door, Inc. v. Insurance Guidance Corp.*, 438 N.E.2d 16 (Ind. Ct. App. 1982) was overruled to the extent that the case held that an appeal may be taken directly from the ruling on a Trial Rule 60(B) motion. The court also noted that a Trial Rule 60(B) motion may not be used as a substitute for a direct appeal based upon a timely Trial Rule 59 motion to correct error after a trial on the merits. *See, e.g., Breeze v. Breeze*, 421 N.E.2d 647 (Ind. Ct. App. 1981).

<sup>148</sup>Rule 60(B)(2) provides that the motion to set aside a default judgment may be based upon "any ground for a motion to correct error." Rule 59(A)(3) states that one basis for a motion to correct error is excessive or inadequate damages. 446 N.E.2d at 338.

companying Trial Rule 59 motion to correct error.<sup>149</sup> Oxidermo argued that Indiana case law permitted a subsequent Trial Rule 60(B) motion if the ground raised was unknown or unknowable to the movant at the time of the first Trial Rule 60(B) motion. The supreme court agreed with that statement in general, but observed that “[t]he additional grounds for relief alleged by Oxidermo in the second and third motions were either discoverable at the time the first Rule 60(B) motion was filed or related to an alleged substantive defense available to Oxidermo . . . .”<sup>150</sup>

The court discouraged the repetitive filing of Trial Rule 60(B) motions by a party suffering a default judgment and observed that when the grounds found under Trial Rule 60(B)(1) through (4) are available, then the party has up to one year from the date of the entry of default or grant of default judgment to make such a motion.<sup>151</sup> The court said it did not wish to encourage defendants or appellants “to hastily file a Rule 60(B) motion as soon as they discover one ground for relief under the Rule and then take their time about discovering and raising other Rule 60(B) grounds and bombarding the court with more such motions.”<sup>152</sup> Thus, the court concluded that although there was appellate jurisdiction in the case, the issue of excessive damages was not reviewable by the appellate court because the defendant failed to raise the issue in the first motion filed under Trial Rule 60(B).<sup>153</sup>

Finally, the court adopted an unpublished court of appeals memorandum decision which held, generally, that the trial court did not err as a matter of law in refusing to excuse Oxidermo for neglect<sup>154</sup> and that the trial court properly overruled a claim of error raised for the first time in a motion to correct error.<sup>155</sup>

2. *Trial Rule 59: Motion to Correct Error—Timeliness.*—The Indiana Supreme Court reviewed the timeliness of a motion to correct error in *Fancher v. State*.<sup>156</sup> In *Fancher*, the defendant filed a motion to correct error which was overruled the next day. Within sixty days of the defendant’s conviction, a second or “supplemental motion to correct error” was filed, which was also overruled. A praecipe on behalf of the defendant was then filed thirty-one days after the trial court overruled the first motion to correct error.<sup>157</sup> The court of appeals, in an unpublished opinion, dismissed the defendant’s appeal. Although an opinion was written

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<sup>149</sup>446 N.E.2d at 338.

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* at 339.

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* at 340.

<sup>155</sup>*Id.* at 341. See *Bradburn v. State*, 256 Ind. 453, 269 N.E.2d 539 (1971); *Macauley v. Funk*, 172 Ind. App. 66, 359 N.E.2d 611 (1977).

<sup>156</sup>436 N.E.2d 311 (Ind. 1982).

<sup>157</sup>*Id.* at 312.

in the supreme court, a motion to transfer was denied because the appeal was not timely perfected.<sup>158</sup>

The Indiana Supreme Court stated that "[a] motion to reconsider or to rehear a motion to correct errors does not extend the time for taking an appeal."<sup>159</sup> This rule is a corollary of the general principle that Trial Rule 59 contemplates only one motion to correct error for each appellant. Once a timely motion to correct error has been *denied*, the court stated, then the time for perfecting an appeal begins to run.<sup>160</sup>

However, an exception exists when or if the trial court responds to the motion by amending, modifying, or altering its final judgment. Then, a party adversely affected may perfect an appeal<sup>161</sup> or file another motion to correct error and thereby extend the time for perfecting the appeal.<sup>162</sup>

3. *Trial Rule 60(B): Relief from Judgment.*—In *Spence v. Supreme Heating, Inc.*,<sup>163</sup> the clerk of the court failed to give notice of a ruling on a motion to correct error, and the losing party did not file a praecipe for an appeal. Later, that party filed a Trial Rule 60(B) motion which the trial court granted without notice or a hearing.<sup>164</sup> The court of appeals held that a Trial Rule 60(B) motion requires notice and a hearing, and that failure to comply with these requirements constituted reversible error.<sup>165</sup> This case manifests the dangers of not strictly complying with the dictates of the trial rules.<sup>166</sup>

In *Mattingly v. Whelden*,<sup>167</sup> the court of appeals considered a question of first impression in Indiana, whether the newly discovered evidence which forms the basis of a Trial Rule 60(B)(2) motion must exist at the time of the contested decision. The court adopted the interpretation given Federal Rule 60(b)(2) and stated that insofar as Trial Rule 60(B)(2) is concerned, the evidence referred to must have been in existence at the time of the judgment.<sup>168</sup>

4. *Appellate Jurisdiction.*—a. *Appellate Rule 15(N): Relief granted on appeal.*—The opinion in *Cunningham v. Hiles*<sup>169</sup> is important in ap-

<sup>158</sup>*Id.*

<sup>159</sup>*Id.* (citing *Mohney v. State*, 159 Ind. App. 246, 249-50, 306 N.E.2d 387, 390 (1974)).

<sup>160</sup>436 N.E.2d at 312.

<sup>161</sup>See IND. R. TR. P. 59(F).

<sup>162</sup>See *Breeze v. Breeze*, 421 N.E.2d 647 (Ind. 1981).

<sup>163</sup>442 N.E.2d 1144 (Ind. Ct. App. 1982).

<sup>164</sup>*Id.* at 1145.

<sup>165</sup>*Id.*

<sup>166</sup>See *Otte v. Tessman*, 426 N.E.2d 660 (Ind. 1981); see also *Rumfelt v. Himes*, 438 N.E.2d 980 (Ind. 1982); *Cox v. Indiana Subcontractors Ass'n*, 441 N.E.2d 222 (Ind. Ct. App. 1982); *Midwest Natural Gas Corp. v. Locke Stove Co.*, 435 N.E.2d 85 (Ind. Ct. App. 1982).

<sup>167</sup>435 N.E.2d 61 (Ind. Ct. App. 1982). See *supra* notes 37-44 and accompanying text.

<sup>168</sup>435 N.E.2d at 65.

<sup>169</sup>439 N.E.2d 669 (Ind. Ct. App. 1982) (on rehearing).

pellate cases in which there is a review of the record, or even perhaps of the evidence, to determine whether relief should be granted.<sup>170</sup> In *Cunningham*, the plaintiff obtained an injunction which was not honored. Later, the plaintiff's request for a contempt citation against the defendant for failure to comply with the injunction was denied. The court of appeals reversed the trial court and ordered that the defendant be cited for contempt within ten days.<sup>171</sup> The defendant appealed that court's disposition contending that the contempt citation was beyond the scope, competency, and purview of the Indiana Rules of Appellate Procedure.<sup>172</sup>

In construing Appellate Rule 15(N)(6) which allows the "[g]rant [of] any other appropriate relief,"<sup>173</sup> the court of appeals held that "[t]he dispositional alternatives available under A.R. 15(N) are coextensive with those which the trial court may grant in acting upon a motion to correct errors."<sup>174</sup> Therefore, the contempt citation was within the authority of the appellate court.

*b. Appellate Rule 8.1: Time for filing briefs.*—The trial court, in *City of South Bend v. Bowman*,<sup>175</sup> dismissed a criminal action against the defendant, holding that a city ordinance was unconstitutionally vague. The appellant, City of South Bend, perfected a timely appeal and filed its brief. However, no appellee brief was filed. The court of appeals held that "[w]hen the appellee fails to file a brief, the Court of Appeals may reverse if the appellant makes a prima facie showing of reversible error."<sup>176</sup>

However, in *Doe v. Hancock County Board of Health*<sup>177</sup> a contrary result was reached. In *Doe*, the appellee miscalculated the deadline and filed its brief one day late. The court of appeals denied the appellee's verified petition to file a belated brief which resulted in the dismissal of the case under Appellate Rule 8.1(A).<sup>178</sup> The Indiana Supreme Court granted the appellant's petition to transfer without opinion and dismissed the action over a strong dissent.<sup>179</sup> The dissent disapproved of the dismissal on a procedural technicality stating that "[t]he action of this Court in

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<sup>170</sup>An example of such a case is an appeal from the granting or denial of most motions under Trial Rule 60, where relief might be granted in the appellate court as easily as in the trial courts, although *Cunningham* is not a Trial Rule 60 case.

<sup>171</sup>439 N.E.2d at 675 (quoting *Cunningham v. Hiles*, 435 N.E.2d 49, 54 (Ind. Ct. App. 1982)).

<sup>172</sup>439 N.E.2d at 675.

<sup>173</sup>IND. R. APP. P. 15(N)6.

<sup>174</sup>439 N.E.2d at 675 (citations omitted).

<sup>175</sup>434 N.E.2d 104 (Ind. Ct. App. 1982).

<sup>176</sup>*Id.* at 105 (citing *Underwood v. Donahue*, 423 N.E.2d 722 (Ind. Ct. App. 1981)).

<sup>177</sup>436 N.E.2d 791 (Ind. 1982).

<sup>178</sup>*Id.* at 791.

<sup>179</sup>*Id.* If the Appellee fails to file a timely brief, the court, in its discretion, may hear the appeal. Apparently, the Indiana Supreme Court found no abuse of discretion. See, e.g., *State ex rel. Amer. Reclamation & Refining Co. v. Klatte*, 256 Ind. 566, 270 N.E.2d 872 (Ind. 1971).

*dismissing the matter on a technical basis effectively deprives the appellants of their constitutional rights of appellate review.*"<sup>180</sup>

### G. Rule Amendments

1. *Trial Rule 53.1: Failure to Rule on Motion.*—The amendment to Trial Rule 53.1 is the first major change in the rule since 1974 and was adopted without commentary or reports from the Supreme Court Rules Committee. Section (A) sets the time limits for ruling and establishes the bases for transferring a case directly to the supreme court from the trial court *upon application by an interested party*.

Section (B) establishes the four instances in which provisions of Trial Rule 53.1(A) do not apply. While the first three exceptions were found in the previous rule, the fourth exception is new in 1983. It provides that the "failure to rule on motion" rule has no application to a repetitive motion, a motion to reconsider, a *motion to correct error* (which is the principle change in this rule), a petition for post-conviction relief, or to ministerial post-judgment acts. It was clearly the intention of the supreme court to remove the motion to correct error from the effect of Trial Rule 53.1. In doing so, the court established a new rule, Trial Rule 53.3, which is specifically applicable to motions to correct error.<sup>181</sup>

Section (C), which is applicable to Trial Rules 53.1, 53.2, and 53.3, defines the specific time when a ruling shall be deemed to have been made. The apparent purpose of this definitional rule is to require that a public entry or a public record be made of the court's ruling within the specified time provisions.

Section (E) gives an interested party absolute power to initiate the withdrawal of an entire case from a sitting judge if the judge fails to rule consistently with Trial Rule 53.1(A). The amended version of this rule does contemplate some discretion on the part of the clerk unlike the preceding version of the rule.<sup>182</sup>

2. *Trial Rule 53.2: Time for Holding Issue Under Advisement.*—Trial Rule 53.2 was rewritten in its entirety by the supreme court effective January 1, 1983, but remains similar to the previous rule. However, following the 1983 amendment the rule lacks the earlier provision where the judge determined an issue and a record of that determination was duly made prior to any action having been taken to effect the removal of the submission of the case, and the appointment of a special judge.

3. *Trial Rule 53.3: Time Limitation for Ruling on Motion to Correct Error.*—Trial Rule 53.3 is entirely new in 1983. It establishes time provisions and limitations for rulings on motions to correct error. Clearly,

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<sup>180</sup>436 N.E.2d at 791 (Hunter, J., dissenting) (emphasis in original).

<sup>181</sup>See *infra* notes 183-85 and accompanying text.

<sup>182</sup>See *State ex rel. Indiana Suburban Sewers, Inc. v. Hanson*, 260 Ind. 477, 480, 296 N.E.2d 660, 662 (1973).

the rule must be cross-read with Trial Rule 59. The rule provides a definition for overruling a motion to correct error. More specifically, a motion is deemed denied if it is not ruled upon in a certain period of time.<sup>183</sup> Most importantly, the failure to rule on a motion to correct error is not a basis for withdrawing a case from a trial judge. The rule provides exceptions<sup>184</sup> to the automatic denial found in Trial Rule 53.3(A) and the court may extend the time limitations for ruling on the motion no more than thirty days.<sup>185</sup>

Trial Rules 53.4 and 53.5, formerly Trial Rules 53.3 and 53.4 respectively, were merely renumbered by the 1983 amendments. The change in the rules' designation number did not affect their meaning or the case law concerning the rules.

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<sup>183</sup>IND. R. TR. P. 53.3(A) provides:

In the event a court fails for forty-five (45) days to set a motion to correct error for hearing, or fails to rule on a motion to correct error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, upon application of any interested party, the pending motion to correct error may be deemed denied.

<sup>184</sup>IND. R. TR. P. 53.3(B) provides:

The time limitation for ruling on a motion to correct error established under Section (A) of this rule shall not apply where:

- (1) The party has failed to serve the judge personally; or
- (2) The parties who have appeared or their counsel stipulate or agree on record that the time limitation for ruling set forth under Section (A) shall not apply; or
- (3) The time limitation for ruling has been extended by Section (D) of this rule.

<sup>185</sup>IND. R. TR. P. 53.3 (D) provides:

The Judge before whom a Motion to Correct Error is pending may extend the time limitation for ruling for a period of no more than thirty (30) days by filing an entry in the cause advising all parties of the extension. Such entry must be in writing, must be filed before the expiration of the initial time period for ruling set forth under Section (A), and must be served on all parties. Additional extension of time may be granted only upon application to the Supreme Court as set forth in Trial Rule 53.1(D).





## IV. Constitutional Law

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### A. First Amendment

1. *School Mail Systems.*—In *Perry Education Association v. Perry Local Educators' Association*,<sup>1</sup> a sharply divided<sup>2</sup> United States Supreme Court held that the first amendment<sup>3</sup> was not violated when a union, which had been elected the exclusive bargaining representative for public schoolteachers in Perry Township (PEA), was granted access to the interschool mail system while access was denied to a rival union (PLEA).<sup>4</sup> The majority categorized the school mail facilities as “[p]ublic property which is not by tradition or designation a forum for public communication.”<sup>5</sup> Therefore, the majority held, the state has the power to reserve the use of its property for its intended purposes as long as the regulation on speech is reasonable and is not a form of viewpoint discrimination.<sup>6</sup> The dissenters rejected the majority’s “public forum” approach, finding the crucial issue to be that of equal access.<sup>7</sup> They would have struck down the restricted-access policy as an impermissible form of viewpoint discrimination.<sup>8</sup>

The majority of the Court rejected arguments by PLEA, the rival union, that the school system had created, by granting access to groups

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<sup>1</sup>103 S. Ct. 948 (1983).

<sup>2</sup>Justices Brennan, Marshall, Powell, and Stevens joined, dissenting. *Id.* at 960 (Brennan, J., dissenting).

<sup>3</sup>“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The first amendment applies to the states through the fourteenth amendment. *Bridges v. California*, 314 U.S. 252 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>4</sup>103 S. Ct. at 958-59.

<sup>5</sup>*Id.* at 955. The Court described three types of public property: (1) places which have by long tradition or government fiat been dedicated to assembly and debate, such as streets and parks, (2) public property which the state has opened up for use as a place for expressive activity, such as university meeting facilities, and (3) public property which is not by tradition or designation a public forum, such as military installations. *Id.* at 954-55.

<sup>6</sup>*Id.* at 955 (citing *United States Postal Serv. v. Greenburgh Civic Ass’n*, 453 U.S. 114, 131 n.7 (1981)).

<sup>7</sup>103 S. Ct. at 961 (Brennan, J., dissenting).

<sup>8</sup>*Id.* at 969.

such as the Cub Scouts and YMCA, a "limited public forum" from which it could not later exclude PLEA. Any forum which might have been created by such grants of access, the Court stated, would have been limited to groups of "interest and educational relevance to students" and teachers and would not thereby necessitate a grant of access to a union concerned only with the terms of teacher employment.<sup>9</sup>

Nor did a prior grant of access to PLEA prohibit later exclusion of the union. When the schoolteachers elected PEA as their exclusive bargaining representative, the status of PLEA and PEA changed. No longer did PLEA represent any of the teachers in the school system. Thus, the exclusion of PLEA was a result of the union's changed status rather than an attempt to discriminate against any viewpoint of the union.<sup>10</sup> The Court emphasized that in a non-public forum the state may restrict access on the basis of subject matter and speaker identity if such restrictions "are reasonable in light of the purpose which the forum at issue serves."<sup>11</sup> Because the purpose of the internal mail system is "to facilitate internal communication of school related matters to teachers,"<sup>12</sup> the Court found it reasonable for the school board to limit access to PEA in order for the union to fulfill its official responsibilities as bargaining representative for the teachers, while permitting the rival union access only to alternative channels of communication such as bulletin boards, meeting facilities, and the U.S. Postal Service.<sup>13</sup>

The arguments of PLEA fared no better under an equal protection analysis. Because the Court found that PLEA had no fundamental right of access, it subjected the school's restrictions only to a "rational basis" level of scrutiny.<sup>14</sup> Once again, the decision to restrict access to the exclusive bargaining representative was found to rationally further a legitimate state purpose.<sup>15</sup>

Justice Brennan, joined by Justices Marshall, Powell, and Stevens, dissented. In the view of the four dissenting justices, the claim presented was an "equal access" claim which should not turn on whether the school mail system was a public forum.<sup>16</sup> Distinguishing a series of cases upholding content-based exclusions on government property,<sup>17</sup> Justice Bren-

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<sup>9</sup>*Id.* at 956.

<sup>10</sup>*Id.* at 956-57.

<sup>11</sup>*Id.* at 957 (citing *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981); *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966)).

<sup>12</sup>*Id.* at 956.

<sup>13</sup>*Id.* at 958-59.

<sup>14</sup>*Id.* at 959-60.

<sup>15</sup>*Id.* at 960.

<sup>16</sup>*Id.* at 961 (Brennan, J., dissenting).

<sup>17</sup>*Id.* at 963 (citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (prison could regulate union organizing activities); *Greer v. Spock*, 424 U.S. 828 (1976) (military can ban partisan political demonstrations on military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city transit system could prohibit political advertising on buses)).

nan described previous exclusions as evenhanded and viewpoint neutral.<sup>18</sup> In contrast, Justice Brennan found that the schools had opened their mail system for discussion of the subject of labor relations in the schools, and by restricting access later to the exclusive bargaining representative the schools were engaging in impermissible viewpoint discrimination.<sup>19</sup>

Justice Brennan approved the equal protection analysis of the United States Court of Appeals for the Seventh Circuit, subjecting the exclusionary access policy to strict scrutiny because viewpoint discrimination implicates core first amendment values.<sup>20</sup> Justice Brennan found no reason for denying access to other labor groups, dismissing the state's asserted interest in preserving labor peace because there was no evidence to support the contention that granting access to rival labor organizations would promote labor instability.<sup>21</sup> The failure of the school board to establish even a substantial state interest in limiting access to the school mail system would, in the opinion of the four dissenting justices, render the policy constitutionally infirm.<sup>22</sup>

2. *Student Demonstrations.*—The first amendment rights of high school students were seriously curtailed in *Dodd v. Rambis*.<sup>23</sup> On Wednesday, September 30, 1981, fifty-four students of Brazil Senior High School protested school discipline procedures by staging a walkout from classes. They gathered across the street from the school, within the sight and hearing of persons inside the building. That evening, five students met to discuss the walkout and drafted a leaflet calling for a meeting of students at a local restaurant on Thursday evening and proposing another walkout at 9:00 a.m. on Friday. The leaflet also advised participants in the proposed walkout to stay off school property. These five students distributed the leaflets at school on Thursday, the day after the first walkout. That afternoon, all five students were suspended and, after a hearing, were later expelled for the remainder of the semester<sup>24</sup> for violations of Indiana Code sections 20-8.1-5-4(a) and (1),<sup>25</sup> and Brazil Senior High School Student Handbook, page 12, section II, paragraph I, which prohibits "[a]ny conduct which causes or which creates a reasonable likelihood that it will cause a disruption or material interference with any school function . . . or that interferes or [sic] a reasonable likelihood that it will interfere with the health, safety, or wellbeing or the rights of other students."<sup>26</sup> The suspensions and expulsions were based on the action of

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<sup>18</sup>103 S. Ct. at 963 (Brennan, J., dissenting).

<sup>19</sup>*Id.* at 965-66.

<sup>20</sup>*Id.* at 966.

<sup>21</sup>*Id.* at 968.

<sup>22</sup>*Id.* at 969.

<sup>23</sup>535 F. Supp. 23 (S.D. Ind. 1981).

<sup>24</sup>*Id.* at 25-26.

<sup>25</sup>IND. CODE § 20-8.1-5-4(a), (1) (1982).

<sup>26</sup>535 F. Supp. at 26.

the students in distributing the leaflet and on the objectionable content of the leaflet in advocating the student walkout.<sup>27</sup>

The "material interference" language of the Student Handbook substantially parallels the language of the Supreme Court in *Tinker v. Des Moines Independent Community School District*,<sup>28</sup> in which the Court struck down a school prohibition against the wearing of black armbands in protest of the Vietnam War. The *Tinker* standard permits prohibition or regulation of student expression where school officials can demonstrate facts which could reasonably have led them to forecast substantial disruption of or material interference with school activities.<sup>29</sup> This standard was utilized by the United States District Court for the Southern District of Indiana to review the actions of Brazil Senior High School officials.<sup>30</sup> The court held that the principal could reasonably have forecast material disruption because of the previous day's walkout accompanied by a general atmosphere of excitement in the school, and because of the specific date, time, and location of another walkout proposed in the leaflets.<sup>31</sup>

The Brazil Senior High School principal made no effort to evaluate

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<sup>27</sup>*Id.* at 28.

<sup>28</sup>393 U.S. 503 (1969).

<sup>29</sup>*Id.* at 513-14.

<sup>30</sup>535 F. Supp. at 27-31.

<sup>31</sup>*Id.* at 29-30. The deferential approach taken by the court in sustaining the actions of the school officials is markedly different from that of the Fifth Circuit Court of Appeals in *Butts v. Dallas Indep. School Dist.*, 436 F.2d 728 (5th Cir. 1971). In *Butts*, the court reversed the suspension of students wearing black armbands despite much stronger evidence of potential disruption. The students involved were participating in a nationwide Vietnam moratorium which had caused Dallas police officials to predict trouble and call schools in order to offer police assistance. Disruptive sit-ins had already occurred in nearby communities; a non-student had phoned in a bomb threat; and students of a differing viewpoint were wearing white armbands and had already clashed with participants in a student demonstration across the street from the school. *Id.* at 729-30. Nevertheless, the court found no support for the school officials' contention that they could reasonably have forecast a material disruption. The court interpreted *Tinker* to be a declaration of

a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them *no practical alternative*. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some *inquiry*, and establishment of *substantial* fact, to buttress the determination.

*Id.* at 732 (emphasis added).

Because the Dallas school administrators had not conferred with student leaders regarding their intentions and had not utilized school machinery for the voicing of opinions, the court held that the mere *ex cathedra* pronouncement of the superintendent, even in light of the volatile environment, would not suffice to meet the requirement of *Tinker*. *Id.* There is support for this approach in the language of *Tinker* itself. "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is *necessary* to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511 (emphasis added). Thus, the prohibition of expression would satisfy the Constitution only if it were necessary, rather than merely expedient.

the actual threat posed by the leaflets. The District Court accepted the prediction of the principal based almost exclusively on the experience of the first walkout. The court could have required some showing of an inquiry such as giving the students an opportunity to present grievances within the school environment, attending the proposed Thursday evening meeting to determine student interest in a second walkout, or at least making some inquiry into the plans for the walkout.<sup>32</sup> A boycott of classes would not necessarily be disruptive to the school. No mention is made of whether the 9:00 walkout time<sup>33</sup> was during classes or during a passing period, which would tend to minimize disruption. In addition, the admonition in the leaflet to stay off school property<sup>34</sup> could have been seen as evidence of an attempt not to disrupt classes. Such inquiries would have enabled the principal to make an informed prediction as to the actual likelihood of material disruption from the proposed walkout.<sup>35</sup> Instead, the district court accepted the prediction made only on the basis of the previous walkout and the bare content of the leaflet.<sup>36</sup>

In sustaining the expulsion as an acceptable form of discipline, rather than limiting the school's remedy to a restraint on the students' speech, the district court discussed the case of *Karp v. Becken*,<sup>37</sup> permitting discipline where school officials can point to a violation of a school rule, such as the rule in the Brazil Senior High School Student Handbook.<sup>38</sup> However, the Ninth Circuit Court of Appeals invalidated the entire suspension in *Karp* because there was no way to determine what part of the suspension was for protected activities.<sup>39</sup> In *Dodd*, the district court explicitly found that the discipline was imposed both for the leaflet distribu-

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<sup>32</sup>See *Butts*, 436 F.2d at 732.

<sup>33</sup>535 F. Supp at 25.

<sup>34</sup>*Id.*

<sup>35</sup>The Court in *Tinker* recognized that

[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .

. . . [S]chool officials . . . must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

393 U.S. at 508-09 (citation omitted).

<sup>36</sup>536 F. Supp. at 29. In the statement of "facts offered by the defendants as justifying a reasonable forecast of material disruption," *id.*, reference is made to an "investigation" by the principal which helped lead him to his forecast. However, in the court's finding of facts, the only investigation referred to is one which led the principal to identify two of the plaintiffs as the students responsible for distributing the leaflets. *Id.* at 26. Any further "investigation" by the principal appears to have been limited to a discussion of the incident with the students involved. See *id.*

<sup>37</sup>477 F.2d 171 (9th Cir. 1973).

<sup>38</sup>*Id.* at 176, cited in *Dodd*, 535 F. Supp at 30.

<sup>39</sup>477 F.2d at 176.

tion and for the objectionable content of the leaflet.<sup>40</sup> Rather than invalidating the expulsions because they were based in part upon the students' protected right to express an unpopular point of view,<sup>41</sup> the court affirmed the expulsions as being within the discretion of school officials, once the *Tinker* standard was met, and within the range of punishment authorized by statute.<sup>42</sup>

The court did, at least, express a warning to school officials not to prohibit constitutionally protected activity, emphasizing the significance of the first walkout in the court's decision.<sup>43</sup> However, this warning may be of little effect in light of the court's deference to school officials and the court's willingness to uphold discipline imposed even when protected speech is implicated.

3. *Juror Interviews*—The interplay between the first amendment rights of freedom of speech and freedom of the press, and judicial authority under Article III of the Constitution of the United States<sup>44</sup> was carefully analyzed in *United States v. Franklin*,<sup>45</sup> a decision in which Judge Sharp of the United States District Court for the Northern District of Indiana modified his previous order enjoining *all* post-trial interrogation of jurors<sup>46</sup> in the trial of Joseph Franklin, acquitted of violating the civil rights of National Urban League President Vernon Jordan.<sup>47</sup>

In re-examining the propriety of that order with regard to the press, Judge Sharp acknowledged the widespread judicial concern with the problem of post-verdict inquiry into jury deliberations, which has resulted in

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<sup>40</sup>535 F. Supp. at 28.

<sup>41</sup>See IND. CODE § 20-8.1-5-4(a) (1982). After enumerating some illustrations of the sort of student conduct that constitutes grounds for expulsion or suspension, subsection (a) states: "This subsection shall not . . . be construed to make any particular student conduct a ground for expulsion where such conduct is constitutionally protected as an exercise of free speech or assembly or other under the Constitution of Indiana or the United States." *Id.* The *Dodd* court might have eased its apparent doubts about the propriety of the punishment imposed in this case by interpreting the above-quoted language as instruction from the legislature to resolve doubtful cases in favor of protecting the first amendment right in question. See 535 F. Supp. at 30-31. The court, however, apparently did not view the plaintiff's actions as being "constitutionally protected." See *id.*

<sup>42</sup>535 F. Supp. at 30-31.

<sup>43</sup>*Id.* at 31.

<sup>44</sup>U.S. CONST. art. III, §§ 1-2.

<sup>45</sup>546 F. Supp. 1133 (N.D. Ind. 1982).

<sup>46</sup>*Id.* at 1136.

<sup>47</sup>After the jury had returned a verdict of not guilty on the night of August 17, 1982, Judge Sharp discharged them with these words: "It is the normal practice of this Court to enjoin those who are participants in this trial, [and] all others, from attempting to interrogate you about the contents of your deliberations or the reasons for your verdict. And that is now done in this case." *Id.* at 1136. A group of news organizations petitioned the court to reconsider and vacate the injunction. Judge Sharp set a hearing date for September 9, 1982, but upon the petitioner-news organizations' "Emergency Petition for Writ of Mandamus" filed on August 23 in the Seventh Circuit Court of Appeals, Judge Sharp was ordered to render a judgment on the petitioner's motion for reconsideration of his injunction against juror interviews by August 30, 1982. *Id.* at 1136-37.

substantial authority both upholding and denying the power of the courts to enjoin such interrogations.<sup>48</sup> The particular circumstances surrounding post-verdict interrogation of jurors appear to be a significant factor in determining the power of the court to enjoin such questioning. For example, the decision in *Franklin* is specifically limited by the fact that this defendant was acquitted.<sup>49</sup> In addition, counsel for the petitioners explicitly conceded the court's power to permanently enjoin the parties and counsel from interrogating jurors and to enjoin any interrogation on the premises of the court house.<sup>50</sup> In a similar vein, the news-gathering rights of the press may be restrained in order to ensure a fair trial<sup>51</sup> or to protect jurors from harassment.<sup>52</sup>

Balancing the competing interests of the jurors, the press, and the courts, Judge Sharp conceded that his initial order might arguably have infringed on first amendment rights. He permitted public and press interviews with the jurors so long as the jurors desired to be interviewed and so long as the interviewing did not constitute harassment of the jurors.<sup>53</sup> In so doing, Judge Sharp recognized the persuasive authority of *United States v. Sherman*,<sup>54</sup> involving a similar injunction against juror interrogation; at the same time, Judge Sharp emphasized that *Sherman* is not binding precedent in the Seventh Circuit.<sup>55</sup> In overturning the injunction of the trial court, the Ninth Circuit Court of Appeals in *Sherman* stated, "The government in order to sustain the order must show that the activity restrained poses a clear and present danger or a serious and imminent threat to a protected competing interest."<sup>56</sup> This reasoning would support Judge Sharp's reservation of the authority to "handle" any harassing interrogation of jurors.<sup>57</sup> Sound policy reasons support prevention of juror harassment: jurors may be called back for other cases, and they may be influenced in their deliberations by anticipated questioning.<sup>58</sup> Where interrogation of jurors rises to the level of harassment, the restraint of such interrogation may be justified under the *Sherman* rationale as necessary

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<sup>48</sup>See *id.* at 1139-44 and cases cited therein.

<sup>49</sup>*Id.* at 1138.

<sup>50</sup>*Id.* at 1141-42.

<sup>51</sup>*Id.* at 1143 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

<sup>52</sup>546 F. Supp. at 1140-41 (citing *Bryson v. United States*, 238 F.2d 657 (9th Cir. 1956); *Rakes v. United States*, 169 F.2d 739 (4th Cir. 1948)).

<sup>53</sup>546 F. Supp. at 1145.

<sup>54</sup>581 F.2d 1358 (9th Cir. 1978). The *Sherman* decision was also cited with approval in *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982).

<sup>55</sup>546 F. Supp. at 1144.

<sup>56</sup>581 F.2d at 1361.

<sup>57</sup>"Any conduct by anyone which constitutes harassment of any member of this jury panel in regard to such interviews will be handled appropriately by this Court." 546 F. Supp. at 1145.

<sup>58</sup>See *id.* at 1140 (citing *Rakes v. United States*, 169 F.2d 739 (4th Cir. 1948)). For a comprehensive discussion of the policy issues involved in juror interviews, see Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983).



to prevent a "serious and imminent threat" to the government's "competing interest" in the orderly administration of justice.

The order of Judge Sharp, as modified, also satisfies the requirements expressed by the United States Supreme Court in *Globe Newspaper Co. v. Superior Court*.<sup>59</sup> In striking down a Massachusetts statute barring press and public access to criminal sex offense trials during the testimony of victims under age eighteen, the Court stated, "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."<sup>60</sup> Although the Court emphasized the narrowness of its decision in *Globe Newspapers*, in light of the mandatory nature of the Massachusetts rule,<sup>61</sup> Judge Sharp's modified order would probably comply with this test in that it prohibited access to jurors only to the extent that the access would tend to obstruct the orderly administration of justice.

4. *Provocation/Fighting Words*.—In overturning a conviction under the Indiana provocation statute,<sup>62</sup> the Indiana Court of Appeals in *Evans v. State*<sup>63</sup> applied the rationales of *Gooding v. Wilson*,<sup>64</sup> and *Chaplinsky v. New Hampshire*<sup>65</sup> to include an "immediacy" requirement in the Indiana statute.<sup>66</sup> The defendant in *Evans* had been convicted of provocation after she called a police officer "fucking pig" or "fucking prick"<sup>67</sup> while she was walking down a street, and the police officer was driving in the opposite direction with his car window rolled up. Believing the woman might need help, the officer then stopped his vehicle, backed up, got out, and arrested Evans for provocation: "recklessly, knowingly, or intentionally engag[ing] in conduct that is likely to provoke a reasonable man to commit battery . . . ."<sup>68</sup>

The court agreed with Evans that the statute must require the showing of an immediacy of a battery in order not to be unconstitutionally

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<sup>59</sup>457 U.S. 596 (1982).

<sup>60</sup>*Id.* at 606-07. See also *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 104 S. Ct. 819 (1984). The Court applied the *Globe* standard in determining the propriety of closed voir dire proceedings. *Id.* at 824. In holding that these particular proceedings should not have been closed, the Court balanced juror privacy interests against the need for openness in judicial proceedings. *Id.* at 824-26.

<sup>61</sup>457 U.S. at 611 n.27.

<sup>62</sup>IND. CODE § 35-42-2-3 (1982). See *infra* text accompanying note 68.

<sup>63</sup>434 N.E.2d 940 (Ind. Ct. App. 1982).

<sup>64</sup>405 U.S. 518 (1972) (Georgia statute prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" held unconstitutionally overbroad because encompassed more than fighting words).

<sup>65</sup>315 U.S. 568, 572 (1942) (first amendment does not protect "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

<sup>66</sup>434 N.E.2d at 942-43.

<sup>67</sup>"[The officer] testified that he saw Evans lean towards the street where he partially heard her say and partially read her lips to say 'fucking pig' or 'fucking prick.'" *Id.* at 941.

<sup>68</sup>IND. CODE § 35-42-2-3 (1982).

overbroad.<sup>69</sup> In reviewing the facts of this case, the court found no showing that the police officer had the immediate capacity to commit a battery against Evans. The court accorded special weight to the fact that these words were spoken to a police officer, who should be able to control his actions while on duty.<sup>70</sup> This concept that words may not be "fighting words" only because they are spoken to a policeman finds support in the concurring opinion of Justice Powell in *Lewis v. City of New Orleans*.<sup>71</sup> "[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance. . . . [A] properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' " <sup>72</sup> Thus, the Indiana court upheld the constitutionality of the provocation statute in *Evans* by narrowly interpreting it so as to require a showing that the words uttered are likely to immediately provoke a battery, but overturned this conviction because the circumstances did not demonstrate a likelihood that a policeman would be provoked to commit battery under the circumstances presented in this case.<sup>73</sup>

### B. Fourth Amendment—Search and Seizure

1. *The Automobile Exception*.—In *Fyock v. State*,<sup>74</sup> the Indiana Supreme Court vacated the decision of the Indiana Court of Appeals and affirmed the trial court's decision that a search of the passenger compart-

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<sup>69</sup>434 N.E.2d at 942-43.

<sup>70</sup>*Id.* at 943 n.2.

<sup>71</sup>415 U.S. 130 (1974).

<sup>72</sup>*Id.* at 135 (Powell, J., concurring).

<sup>73</sup>In another first amendment case of note, the United States District Court for the Northern District of Indiana issued a preliminary injunction prohibiting the city of Fort Wayne from conditioning continued employment of a municipal worker upon payment of union dues or an equivalent "agency fee." *Perry v. City of Fort Wayne*, 542 F. Supp. 268, 275 (N.D. Ind. 1982). The court issued the injunction after finding a reasonable likelihood that the plaintiff would succeed on the merits of her claim that an "agency shop agreement" was unconstitutional on its face as a violation of her first amendment rights, and after finding it unlikely that the defendant-city would be able to show a sufficiently strong governmental interest to justify the infringement of those rights. *Id.* at 273. Although the court made repeated reference to "First Amendment rights" and "First Amendment violations," it never identified precisely which of the plaintiff's first amendment rights were violated, beyond the statement that plaintiff's persistent protests against "the use of her fees for political purposes show that she had her First Amendment rights in mind when she refused to pay." *Id.* at 272. However, the court's reliance on *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), makes it apparent that the first amendment right in question is "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Id.* at 222; see *id.* at 233-35. For a more complete discussion of the *City of Ft. Wayne* case, see Archer, *Labor Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 245, 247 (1984).

<sup>74</sup>436 N.E.2d 1089 (Ind. 1982). For a further discussion of this case, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 131 (1984).

ment of an automobile is permissible as a contemporaneous incident of a lawful custodial arrest of the occupant of that automobile if initially there was probable cause to effect a warrantless arrest of the occupant.<sup>75</sup>

The warrantless search occurred after an off-duty police officer observed a subject he was watching pass a "sock type thing" to Fyock through the driver's side window of a car in which Fyock and other occupants were observed smoking a cigarette. The officer smelled the odor of burning marijuana coming from the car. After the officer identified himself, Fyock started the car, and the subject and the other occupants of the car fled on foot. Fyock stopped the car when the officer drew his gun, then was pulled from the car, patted down, and handcuffed while police officers searched a sweatsock lying on the rear passenger floor of the car.<sup>76</sup> The search revealed tablets of methaqualone inside the sock; Fyock was subsequently convicted upon that evidence of possession of a controlled substance.<sup>77</sup>

The Indiana Court of Appeals reversed the conviction holding that although there might have been probable cause to effect the warrantless search of Fyock's person, the search and seizure of the sock on the rear floor of the car violated his fourth amendment rights.<sup>78</sup> The search was not within the scope of a search incident to arrest,<sup>79</sup> and, further, the search could not be justified under the automobile exception as most recently defined by *New York v. Belton*,<sup>80</sup> without creating constitutional issues of retroactivity and ex post facto application.<sup>81</sup>

The United States Supreme Court in *Belton* permitted a search of the passenger compartment of an automobile as a contemporaneous incident of arrest.<sup>82</sup> A container within the passenger compartment may also be searched "whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."<sup>83</sup>

The crucial issue for the courts was whether *Belton's* holding should be applied "to a search conducted over a year earlier in light of the fact

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<sup>75</sup>*Id.* at 1093.

<sup>76</sup>*Id.* at 1092-93. Note that as a container search it was a search within a search. Defendant did not contest the first search, that of the person and the automobile, but he did object to the second search when the officer turned the sock inside out thus revealing the drugs. *Id.* at 1093-94.

<sup>77</sup>*Id.* at 1091.

<sup>78</sup>428 N.E.2d 58, 64 (Ind. Ct. App. 1981).

<sup>79</sup>*Id.* See *Chimel v. California*, 395 U.S. 752 (1969) (a search incident to arrest allows for a search of the arrestee's person and the area within his immediate control). *But cf.* *Johnson v. State*, 413 N.E.2d 335 (Ind. Ct. App. 1980) (search of defendant's purse without a warrant was improper fifteen minutes after the defendant had been arrested and restrained).

<sup>80</sup>453 U.S. 454 (1981).

<sup>81</sup>428 N.E.2d at 63.

<sup>82</sup>453 U.S. at 462-63.

<sup>83</sup>*Id.* at 461.

that the Indiana Supreme Court, previous to *Belton*, had assigned a more narrow scope to similar searches.”<sup>84</sup> The Indiana Court of Appeals held that to give *Belton* retroactive application without plain and unequivocal direction by the United States Supreme Court would violate the spirit of ex post facto limitation.<sup>85</sup> Hence, the search in *Fyock* had to be governed by the automobile exception interpretations existing at the time of the search.<sup>86</sup>

The Indiana Supreme Court did not agree that *Belton* had established a new constitutional principle in search and seizure law and claimed *Belton* merely elaborated on what was already a well settled principle of law.<sup>87</sup> The court, without dissent, held that there could be no question of retroactive application of *Belton*, and therefore, no ex post facto issue.<sup>88</sup> Moreover, the court believed the decision would have been the same if *Belton* had never been decided.<sup>89</sup>

In recent years Indiana's case law has paralleled the litigious activity nationally in automobile search law.<sup>90</sup> Unfortunately, despite the opportunity for clarification and definition, the litigation has resulted mostly in irreconcilable opinions differentiated only by a few facts.<sup>91</sup> To justify the search in *Fyock*, the Indiana Supreme Court cited *Henry v. State*,<sup>92</sup> where a search, upon an informant's tip, of a cigarette package on an automobile's floor revealed heroin. In both *Henry* and *Fyock* the officer had probable cause to believe not only that the car contained contraband but also that an item turned up in the search of the car would contain contraband. However, in *Henry* the belief was supported by a tip by a reliable informant as well as the officer's observations.<sup>93</sup> In *Fyock* probable cause was based only on the personal observations of the police officer. Still, the court found the officer had probable cause to believe the sock contained contraband and that alone, under the circumstances, justified the warrantless search.<sup>94</sup>

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<sup>84</sup>428 N.E.2d at 62; see, e.g., *Bradford v. State*, 401 N.E.2d 77 (Ind. 1980); *Johnson v. State*, 413 N.E.2d 335 (Ind. Ct. App. 1980).

<sup>85</sup>428 N.E.2d at 62-63.

<sup>86</sup>*Id.* at 63.

<sup>87</sup>436 N.E.2d at 1092.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>See, e.g., *Nicaud v. State*, 401 So. 2d 43 (Ala. 1981); *Hinkle v. Anchorage*, 618 P.2d 1069 (Alaska 1980); *State v. Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); *Louisiana v. Cunningham*, 412 So. 2d 1329 (La. 1982); *State v. Compton*, 293 N.W.2d 372 (Minn. 1980); *Horton v. State*, 408 So. 2d 1197 (Miss. 1982); *State v. Jose Roman*, 53 N.Y.2d 39, 422 N.E.2d 554, 439 N.Y.S.2d 894 (1981); *Christian v. State*, 592 S.W.2d 625 (Texas Crim. App. 1980).

<sup>91</sup>See, e.g., *Rogers v. State*, 396 N.E.2d 348 (Ind. 1979); *Henry v. State*, 269 Ind. 1, 379 N.E.2d 132 (1978); *Montague v. State*, 266 Ind. 51, 360 N.E.2d 181 (1977).

<sup>92</sup>269 Ind. 1, 379 N.E.2d 132 (1978).

<sup>93</sup>*Id.* at 8, 379 N.E.2d at 137.

<sup>94</sup>436 N.E.2d at 1095. Moreover, the court dismissed the appellant's expectation of

*Fyock* goes beyond what any previous Indiana case permitted in automobile search and opens the interior of the car and the interior of containers within that car to the inspection of an arresting officer. The expansiveness of *Fyock* is caused in part by the incorporation of *Belton* rationale; however, the decision also appears prompted by the United States Supreme Court opinion in *United States v. Ross*,<sup>95</sup> less than one month earlier, which spoke with the same tongue on the appropriateness of the search of an automobile if supported by probable cause.

In *Ross*, the Supreme Court granted certiorari in an attempt to prescribe clear guidelines for conducting warrantless searches involving automobiles and containers.<sup>96</sup> The Court acknowledged a lack of uniformity in their previous decisions in *New York v. Belton*<sup>97</sup> and *Robbins v. California*.<sup>98</sup> The *Belton* rule authorized a search incident to arrest even when there was no cause to believe that the container searched held evidence,<sup>99</sup> while the *Robbins* rule disallowed a search even when probable cause existed, if the owner had a reasonable expectation of privacy in the contents of the package or container.<sup>100</sup> The conflicting holdings of *Belton* and *Robbins* set the stage for *Ross*.

In *Ross*, police officers acting upon an informant's tip, stopped Ross in his automobile, instructed Ross to step out of the vehicle, and then conducted a warrantless search of the passenger compartment, glove compartment, trunk and a paper bag within the trunk. Later, at the police station, the officers reopened the trunk, and found and searched a zippered leather pouch.<sup>101</sup> The officers uncovered heroin in the closed paper bag and \$3,200 in the zippered leather pouch. Ross was convicted on this evidence.<sup>102</sup>

The United States Supreme Court held that once a legitimate search is under way, practical considerations and interests of "prompt and efficient completion of task at hand," take priority over the fine distinctions between glove compartments, trunks, upholstered seats, and wrapped packages.<sup>103</sup> The Court held that the scope of the warrantless search "is

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privacy arguments, holding the appellant did not have an actual expectation of privacy in the sock and society was not prepared to recognize one's privacy expectation in a sock as reasonable. *Id.*; see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>95</sup>456 U.S. 798 (1982).

<sup>96</sup>*Id.* at 800.

<sup>97</sup>453 U.S. 454 (1981).

<sup>98</sup>453 U.S. 420 (1981).

<sup>99</sup>453 U.S. at 460-61.

<sup>100</sup>453 U.S. at 428. The irony of this juxtaposition is evidenced further by the Justices' positions in *Robbins* and *Belton*. Justices Blackmun, Rehnquist, and Stevens upheld the searches in both cases. Justices Brennan, White, and Marshall invalidated both searches. Only the Chief Justice, Justice Stewart, and Justice Powell reached the curious conclusion that a citizen has a greater privacy right in a package of marijuana enclosed in a plastic wrapper (*Robbins*), than in the pocket of a leather jacket (*Belton*). 453 U.S. at 444 n.1.

<sup>101</sup>456 U.S. at 800-01.

<sup>102</sup>*Id.* at 801.

<sup>103</sup>*Id.* at 821.

not defined by the nature of the container in which the contraband is secreted,” but “by the object of the search and the places in which there is probable cause to believe it may be found.”<sup>104</sup>

In reviewing the automobile exception and upholding the search of containers found within automobiles, the majority found the doctrine was born of practicality, and not of the mobility of the automobile or a person's lesser expectation of privacy in the automobile.<sup>105</sup> Further, the majority stated that a warrant would be unnecessary when the circumstances demand prompt action and obtaining a warrant would be impractical.<sup>106</sup> The only limitations placed by the majority upon their expansive holding include probable cause and a reasonable belief that the object searched will contain the items sought.<sup>107</sup> Probable cause to believe that a container placed in the trunk of a taxicab contains contraband or other incriminating evidence will not justify a search of the entire cab.<sup>108</sup> The requirement could pose little restriction. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband or other such evidence.

The dissent in *Ross* decried the decision as violating the warrant rationale and obviating the automobile exception.<sup>109</sup> According to the dissent, the *Ross* majority endows police with the same authority of a magistrate whenever exigent circumstances require an immediate search of a container.<sup>110</sup> The determination of probable cause, traditionally made by a neutral and detached magistrate, will now be judged by the officer engaged in the enterprise of ferreting out crime.<sup>111</sup>

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<sup>104</sup>*Id.* at 824. The Court posited the example that “probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.” *Id.* Although a search for some objects may be curtailed by this limitation, it has no effect on searches for small items such as narcotics.

<sup>105</sup>*Id.* at 820. The dissent, however, noted that in *Carroll v. United States*, 267 U.S. 132 (1925), the grandfather of the automobile exception, the item searched was the car itself, i.e., the upholstered seats were torn apart in search of whiskey; no *movable container* was ever searched in *Carroll*. 456 U.S. at 836 n.7. Where a container is an integral part of the car, mobility is a practical consideration. However, where the container can be removed, practical considerations are minimal. A container presents little administrative burden if seized and taken to the station while a warrant is obtained. See *United States v. Dall*, 608 F.2d 242 (1st Cir. 1979).

<sup>106</sup>456 U.S. at 806-08. Although “impractical” is never precisely defined, one senses that few searches will be deemed unreasonable in a post hoc judicial review.

<sup>107</sup>*Id.* at 807-08. Thus, the Court held that “the scope of the warrantless search authorized by [the *Carroll*] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant.” *Id.* at 825.

<sup>108</sup>*United States v. Chadwick*, 433 U.S. 1 (1977), seemingly survives under this holding, if only tenuously. However, where probable cause to search the entire automobile exists, then every container within it is also subject to search if it is reasonable to believe the items sought may be contained within.

<sup>109</sup>456 U.S. at 828.

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* at 829.

The dissent's analysis of the automobile exception found a warrantless search justified, not on probable cause alone, but on *probable cause coupled with the mobility of the automobile* which is the exigent circumstance justifying the exception to the warrant requirement.<sup>112</sup> "The practical mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate."<sup>113</sup> The dissent alleged that in equating a police officer's estimation of probable cause with a magistrate's and in excising the mobility rationale from the automobile exception, the majority had violated the principles of the fourth amendment and had taken the first step toward an unprecedented probable cause exception to the warrant requirement.<sup>114</sup> In truth, the majority's holding probably does not create a new exception, but diminishes the need for an exception. By extinguishing mobility as the underlying basis for the automobile exception, the exception loses the persuasive justification for its existence. Thus, without exigent circumstances and without a warrant, the officer's determination of probable cause combined with a reasonable belief that items searched will yield contraband is sufficient.

The *Ross* decision is based largely on matters of expediency and practicality for law enforcement. The significance of *Ross* and *Fyock* lies in the apparent willingness of courts to accept any intrusive warrantless search provided probable cause is present. Past arguments such as expectation of privacy, or mobility, may have little effect in the future on courts faced with a warrantless search of a container within an automobile.

2. *Community Caretaking Exception*.—In *United States v. Pichany*,<sup>115</sup> the seventh circuit held that the community caretaking exception did not extend to a warrantless search of a warehouse undertaken by police officers investigating an unrelated burglary. The exception generally allows officers engaged in a community caretaking function, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute, to observe, note and introduce evidence acquired purely because of their role as a police officer in their contact with the public.<sup>116</sup> The defendant in *Pichany* was storing stolen tractor

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<sup>112</sup>*Id.* at 833.

<sup>113</sup>*Id.* at 832. Mobility of the container had little persuasive or conclusive force for the majority. Indeed, the *Ross* court seems to adopt the same rationale as applied in *Chambers v. Maroney*, 399 U.S. 42 (1977). If a container may be searched under the automobile exception, then it may still be searched later though the justification for the search may have disappeared.

<sup>114</sup>456 U.S. at 827 (White, J., dissenting).

<sup>115</sup>687 F.2d 204 (7th Cir. 1982). This case is also discussed in Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 130 (1984).

<sup>116</sup>See *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cady v. Dombroski*, 413 U.S. 433 (1973). The exception is justified by three distinct considerations: "the protection of the owner's property while it remains in police custody, the protection of police against



and farm equipment in a leased warehouse which was one of a series of warehouses in an industrial park.<sup>117</sup> Police officers called to the park to investigate a burglary in an adjacent warehouse entered defendant's unlocked warehouse and noted the serial numbers on three suspicious-looking vehicles stored inside. Upon later discovering the vehicles were stolen in an unrelated burglary, the officers obtained a search warrant, returned to the warehouse, seized the vehicles and arrested the defendant.<sup>118</sup>

The government argued on appeal, following the trial court's granting of the defendant's motion to suppress the evidence found in the warehouse, that the search was justified under the community caretaking exception and therefore evidence discovered during the warrantless search should not be suppressed.<sup>119</sup> The government contended that the officers were not investigating the defendant's involvement in any crime and entered his warehouse only to search for a person connected with the unrelated burglary. Therefore, because they were acting in the community caretaking role, evidence obtained from that entry should not have been suppressed.<sup>120</sup>

The seventh circuit dismissed these arguments, noting the community caretaking exception applies only to automobiles taken into police custody.<sup>121</sup> The caretaking exception is justified by concerns for the uninterrupted flow of traffic on the highways, or for preservation of evidence.<sup>122</sup> Neither of these concerns should have prompted the officers' actions in *Pichany*. The seventh circuit was unwilling to allow the community caretaking exception unless it could be shown that: (1) the officers exercised control or dominion over the property; (2) the officers were under an obligation to secure the warehouse or preserve its contents where a threat of damage or theft was immediately present; or (3) the officers entered the warehouse to protect the defendant or the public from potential danger.<sup>123</sup>

The reluctance of the court to extend the community caretaking exception beyond the automobile context seems proper given the constitu-

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claims of disputes over lost or stolen property, and the protection of the police from potential danger." *Opperman*, 428 U.S. at 368.

<sup>117</sup>687 F.2d at 205-06.

<sup>118</sup>*Id.* at 206.

<sup>119</sup>*Id.* at 207. The government appealed the district court's decision to suppress the evidence pursuant to 18 U.S.C. § 3731 (1976) which permits an appeal from a decision or order suppressing evidence if the appeal is "not made after the defendant had been put in jeopardy and before the verdict or finding on an indictment or information." 687 F.2d at 205, n.1.

<sup>120</sup>*Id.* at 207.

<sup>121</sup>*Id.* at 208-09. Although no Indiana court has ever alluded to the community caretaking exception, let alone defined its application, the seventh circuit's decision that it applies only to automobiles is consistent with other circuit decisions. See *United States v. Markland*, 635 F.2d 174 (2d Cir. 1980); *United States v. Coleman*, 628 F.2d 961 (6th Cir. 1980); *United States v. Staller*, 616 F.2d 1284 (5th Cir. 1980); *United States v. Newbore*, 600 F.2d 452 (4th Cir. 1979).

<sup>122</sup>687 F.2d at 207 (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

<sup>123</sup>687 F.2d at 207-08.



tional difference between houses and cars.<sup>124</sup> Only when exigent circumstances prevent the officer from first obtaining a warrant should the search be excepted.<sup>125</sup> In the absence of cases applying the exception to private homes or business, the seventh circuit properly refused to extend the community caretaking exception beyond the automobile search context.

3. *Plain View*.—In another warehouse case, the seventh circuit held that the incriminating nature of items seized during a search of a warehouse may be immediately apparent and therefore the seizure is properly within the scope of the plain view doctrine.<sup>126</sup> Generally, for evidence seized during a search to qualify for the plain view exception to the warrant requirement, “it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent.”<sup>127</sup>

In *United States v. Thomas*,<sup>128</sup> when the warehouse lessor, a former police officer, collected rent from the defendant-lessee, he observed men cutting apart an automobile. Upon the lessor’s tip, FBI agents began surveillance, watching stolen cars being driven into the warehouse. Agents entered with a warrant to seize specific stolen cars and found parts from numerous autos.<sup>129</sup> The defendant moved to suppress the evidence not listed in the warrant, but which was seized by the agents while executing the warrant.<sup>130</sup> The defendant argued the incriminating nature of those items—disassembled stolen automobile parts—was not immediately apparent.<sup>131</sup>

The seventh circuit found the incriminating nature of the parts seized was immediately apparent and the seizure was within the scope of the plain view doctrine.<sup>132</sup> Although officers may not use the pretext of “plain view” to conduct general inventory searches for items that may have a suspect character,<sup>133</sup> in the present case agents knew that stolen cars were being driven into the warehouse, and that cars were being cut up inside

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<sup>124</sup>Although automobiles are “effects” and are protected against unreasonable searches under the fourteenth amendment, automobile searches may be excepted under the warrant requirement for reasons that would not justify a similar search of home or office. The distinction between car and home seems based on the mobility of the automobile and the lesser expectation of privacy one has in an automobile. See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

<sup>125</sup>The government did not even argue exigent circumstances on appeal. 687 F.2d at 209. However, the government did raise a “good faith” argument for the first time on appeal, but it was denied for failure to advance it first in the lower court. *Id.* at 209-10.

<sup>126</sup>*United States v. Thomas*, 676 F.2d 239 (7th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

<sup>127</sup>*United States v. Schire*, 586 F.2d 15, 17 (7th Cir. 1978) (citations omitted).

<sup>128</sup>676 F.2d 239 (7th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

<sup>129</sup>676 F.2d at 241.

<sup>130</sup>*Id.* at 243.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Id.* (citing *United States v. Schire*, 586 F.2d 15, 18 (7th Cir. 1978)).

the building. With this information the incriminating nature of the items seized was immediately apparent and was properly within the scope of the plain view doctrine.<sup>134</sup>

### C. Eighth Amendment and Section 1983

*"Persons are sent to prison as punishment, not for punishment."*<sup>135</sup>

1. *Prison Conditions.*—Civil rights actions and eighth amendment challenges to conditions of prison life have become increasingly prevalent in recent years.<sup>136</sup> *French v. Owens*,<sup>137</sup> the most recent case of this trend, was a class action brought under 42 U.S.C. § 1983 by four inmates in the Indiana Reformatory on behalf of themselves and the plaintiff class, defined as "all persons who are or in the future may be confined in the Indiana Reformatory, Pendleton, Indiana."<sup>138</sup> The inmates complained of poor living conditions, inadequate medical care, lack of safety and security, bad food services, inadequate educational and vocational programs, an arbitrary system of prison discipline, and insufficient access to the courts.<sup>139</sup> The inmates maintained that the overcrowding of the prison, coupled with all other conditions constituted cruel and unusual punishment in violation of the eighth amendment.<sup>140</sup> Plaintiffs sought to

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<sup>134</sup>676 F.2d at 244.

<sup>135</sup>*Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977).

<sup>136</sup>*See generally* *Estelle v. Gamble*, 429 U.S. 97 (1976); *Anderson v. Redman*, 429 F. Supp. 1105 (D. Del. 1977); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

<sup>137</sup>538 F. Supp. 910 (S.D. Ind. 1982).

<sup>138</sup>*Id.* at 911.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.* Specifically, the plaintiffs alleged the following deficiencies:

1. The Indiana Reformatory had three cellhouses and two dormitories. In those units, only 860 cells were available for inmate occupation in January, 1978. However, the prison population at that time was 1,297 and by January of 1982 it had risen to 1,972. Consequently the cells did not provide an adequate amount of living space for the individuals incarcerated therein.
2. The cells were inadequately lit, inadequately ventilated and heated, did not contain hot water and were infected with disease carrying vectors, including birds, due to lack of such basics as screened windows in the cellhouse.
3. Each cell contained an uncovered toilet which often leaked as did the sink. The cells did not contain any chairs or area within which the inmate could walk or exercise.
4. The shower areas were unfit for humans due to the inadequate number of shower heads, the decrepit conditions of the showers, and the filth and mold that accumulated.
5. The Reformatory had a doctor who could not adequately speak English, an untrained and inadequate staff, a crumbling and antiquated facility, and misdiagnosed, leaving the inmate in pain for lengthy periods or with permanent damage.
6. The Reformatory failed to reasonably protect an inmate from the constant threat of violence and sexual assault by his fellow inmates.
7. The Reformatory failed to provide inmates with food prepared in sanitary conditions or to provide for special diets.

enjoin the responsible state officials from further violations of their constitutional rights.<sup>141</sup>

Judge Dillin of the United States District Court for the Southern District of Indiana heard evidence in this case for over a month during the summer of 1978, and again for five days in March of 1982.<sup>142</sup> In addition, the Judge, in the presence of counsel, inspected the cellblocks, infirmary and other areas of the prison on March 5, 1982.<sup>143</sup>

Lacking a precise definition of cruel and unusual punishment and mechanical standards to apply, Judge Dillin invoked the "evolving standards of decency that mark the progress of a maturing society" against which the punishment could be measured.<sup>144</sup> The court determined that the conditions alleged by the plaintiffs should not be viewed in isolation, but that the "totality of conditions" must be examined in evaluating eighth amendment claims.<sup>145</sup>

Based upon findings of fact that the medical care and mental health treatment were inadequate;<sup>146</sup> that academic and vocational education opportunities for those in idle hold and self-lockup were not in compliance with state law;<sup>147</sup> that because of overcrowding, lack of planning and fund-

8. Vocational training shops lacked adequate or proper equipment and did not provide worthwhile or practical training for inmate participants.

9. The Reformatory lacked sufficient personnel to deal with the mental health needs of the prisoners.

10. The procedures utilized for violation of the disciplinary rules provided for pre-hearing confinement. At a hearing the inmate's right to call a witness was not always respected.

11. The Reformatory failed to provide an adequate program of exercise and recreation for many participants.

12. The Reformatory failed to provide reasonable access to the law library or to trained legal staff whereby the inmates might gain access to the courts.

See Plaintiff's Post Trial Memorandum and Plaintiff's Proposed Findings of Facts.

The last allegation coupled with the allegation that inmates at Pendleton were treated more harshly than inmates at the Indiana State Farm, formed the plaintiffs' fourteenth amendment challenge. The court found no merit in these allegations and dismissed them. 538 F. Supp. at 924.

<sup>141</sup>538 F. Supp. at 911.

<sup>142</sup>*Id.* at 911-12. In the interim period, Judge Dillin reserved ruling pending submission by the parties of proposed findings of fact and conclusions of law, and the filing of post-trial briefs. *Id.* The opinion does not explain the delay of nearly four years between the original trial in 1978 and the reopening of the cause to hear additional evidence in 1982.

<sup>143</sup>*Id.* at 912.

<sup>144</sup>*Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). In the past, courts have looked mainly to whether the punishment to which an individual or prison population has been subjected are so far below civilized norms as to be cruel and unusual. See, e.g., *O'Brien v. Moriarity*, 489 F.2d 941 (1st Cir. 1974).

<sup>145</sup>538 F. Supp. at 912 (citing *Gates v. Collier*, 501 F.2d 129 (5th Cir. 1974)).

<sup>146</sup>538 F. Supp. at 919.

<sup>147</sup>*Id.* at 920. Idle hold consists of prisoners not yet given a permanent job assignment. Prisoners in self-lock up are under protective custody in the administrative segregation unit and are confined for an indeterminate period of time which may last over two years.

ing, prisoners were denied proper exercise and recreation;<sup>148</sup> and that the institution failed to meet state and federal health sanitation, safety and fire laws,<sup>149</sup> Judge Dillin held the defendants, in their official capacity, had violated numerous relevant Indiana statutes.<sup>150</sup>

To remedy these violations the court ordered that the facilities be brought into compliance with the standards of the State Board of Health and the State Fire Marshal; that each inmate be given opportunity and facilities to engage in recreation; that medical care facilities, proper equipment and qualified medical personnel be obtained for proper diagnosis and treatment of medical and mental health problems; that efforts be taken through staff operations to ensure the safety and security of inmates; and that each inmate be provided with an education, vocation, or job assignment.<sup>151</sup>

No Indiana statute specifically addressed the issue of overcrowding,<sup>152</sup> thus leaving the court to rely upon case law analysis.<sup>153</sup> Although there was no constitutional prohibition against the use of the double celling or double bunking policies which led to the crowded conditions,<sup>154</sup> and despite previous case law which found double celling was not a violation of the constitutional ban on cruel and unusual punishment,<sup>155</sup> the court found that the overcrowding of the institution *when coupled with* all of the other conditions, constituted cruel and inhuman treatment in violation of the eighth amendment.<sup>156</sup>

The court distinguished those cases where the prisoners were housed

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<sup>148</sup>*Id.* at 916.

<sup>149</sup>*Id.* at 921-22.

<sup>150</sup>*Id.* at 924. *See* IND. CODE §§ 11-10-3-2(c), 11-10-4-2, 11-10-5-1, 11-10-6-2, 11-10-6-3, 11-10-11-1, 11-10-11-2, 11-11-6-1, and 11-11-6-2(a) (1982). The blow of this abysmal record was hardly softened by the court's findings that the plaintiff's had not carried their burden of proving violations of either state or federal law in the areas of prison discipline and access to courts. 538 F. Supp. at 924. The federal court's jurisdiction over the plaintiff's state law claims was pendent to its jurisdiction over the federal § 1983 cause of action. *Id.* at 911.

<sup>151</sup>538 F. Supp. at 927-28.

<sup>152</sup>*See id.* at 924.

<sup>153</sup>In determining the constitutionality of crowded conditions in prisons, the courts most often look at:

- 1) the design capacity of the institution;
- 2) the number of inmates housed in excess of capacity;
- 3) the square footage per inmate for sleeping and living; and,
- 4) the type of housing (cell or dormitory).

*See, e.g.,* Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976), *vacated*, 539 F.2d 547 (5th Cir. 1976); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972).

<sup>154</sup>538 F. Supp. at 924-25.

<sup>155</sup>*Id.* at 925 (citing Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979)).

<sup>156</sup>*Id.* at 926.

in relatively modern, bright, clean spacious cells.<sup>157</sup> Inmates occupying cells at the Indiana Reformatory were provided from 22 to 23.8 square feet of space, less that taken up by the beds, the lavatory and the commode.<sup>158</sup> The court pointed out that even a penned animal must be given at least 24 square feet for exercise under the Indianapolis City Code,<sup>159</sup> and that expert witnesses, including the defendant's experts, testified that the "minimum amount of square feet per man thought to be necessary . . . is 50 square feet."<sup>160</sup>

The overcrowding led to more than just aggravation. Severe forms of violence, including stabbings, bludgeoning, and homosexual rapes, occurred with distressing frequency. Gambling commenced and racial tensions increased. Nightly disturbances and noise frequently prevented quiet until 2:30 or 3:30 a.m.<sup>161</sup> These considerations prompted the court to order the population at the Reformatory limited to 1,950 and decreased in incremental amounts on a yearly schedule.<sup>162</sup> Effective January 1, 1983 double celling was prohibited and double bunking will not be permitted after January 1, 1984.<sup>163</sup>

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<sup>157</sup>The court noted that in *Bell v. Wolfish*, 441 U.S. 520 (1979), the correctional institution was described by the Supreme Court as follows: "The [institution] differs markedly from the familiar image of a jail; there are no barred cells, dark, colorless corridors or clanging steel gates . . . ." 538 F. Supp. at 925 (quoting 441 U.S. at 525). Moreover, the complainants were pretrial detainees, confined to their cells only during normal sleeping hours, with an average length of detention of about 60 days. 538 F. Supp. at 925. The court also noted that in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the district court described the correctional institution as "unquestionably a top-flight, first class facility," and that the Supreme Court reversed the district court's conclusion that double celling constituted cruel and unusual punishment because "[v]irtually every one of the [district] court's findings tends to *refute* [the prisoners'] claim . . . ." 538 F. Supp. at 925 (quoting 452 U.S. at 347-48). Judge Dillin stated that "the two cases . . . merely serve to point up specific situations in which the facts did not demonstrate a violation of the Eighth Amendment's ban on cruel and unusual punishment." 538 F. Supp. at 925. "In contrast to the new, clean and relatively comfortable facilities described in *Wolfish* and *Rhodes* . . . we find in the Indiana Reformatory . . . a 59 year old structure with inadequate [facilities, services and living space]." *Id.* at 925-26.

<sup>158</sup>It was physically impossible for a double celled occupant of the upper bed to sit erect. Because there was no room for a chair or stool in the double cell, the inmate could not sit except upon the floor or the coverless toilet. In the dormitories, conditions were no less crowded; bunks were as close together as 20 to 24 inches or less, close enough to touch one bunk while lying in the other. 538 F. Supp. at 914-15. In 1982, the population level was at least 50 percent over design capacity. *See id.* at 913.

<sup>159</sup>*Id.* at 913 (citing CODE OF INDIANAPOLIS AND MARION COUNTY, IND. § 6-7 (1975)).

<sup>160</sup>538 F. Supp. at 914.

<sup>161</sup>*Id.* at 922-23. These cumulative incidences of behavior are not surprising in light of recent prison studies. The number of illness complaints and degree of psychological stress of prisoners can be correlated to the spacial and social density in the prison. *See, e.g.,* McCain, Cox, & Paulus, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENVIRONMENT & BEHAVIOUR 283, 290 (1976).

<sup>162</sup>538 F. Supp. at 927.

<sup>163</sup>*Id.*

The fault of the statute violations and overcrowding, the court noted, was not entirely that of the defendant's; the blame must also fall on the Indiana General Assembly in failing to provide for the critical situation.<sup>164</sup> The court took judicial notice of the fact that while legislating lengthened sentences for violations of criminal law, the legislature failed to allocate funds to provide for the increasing number of commitments for longer terms.<sup>165</sup> Without adequate funding in the future, prisons cannot be reasonably expected to accommodate those persons entrusted to their care and future violations and consequent litigation will be the certain result.

2. *Collateral Estoppel in Previously Litigated Prison Conditions.*—An eighth amendment challenge brought into issue the question of res judicata and collateral estoppel<sup>166</sup> in *Crowder v. Lash*,<sup>167</sup> when the conditions complained of had previously been litigated in a class action, in which the present plaintiff was a class member.<sup>168</sup>

In *Aikens v. Lash*, decided in 1974, the plaintiffs sought injunctive relief, alleging violations of the following federal constitutional rights:

1) Plaintiffs were denied due process by their transfer from Indiana Reformatory to the Indiana State Prison without minimum procedural protections.

<sup>164</sup>*Id.* at 926.

<sup>165</sup>*Id.* The court did acknowledge the Indiana General Assembly's appropriation of funds in 1979 and 1981 for construction or rehabilitation at the reformatory. *Id.*

<sup>166</sup>Because the doctrines of res judicata and collateral estoppel are so frequently confused, a short summary of the principles involved may be helpful.

In *Allen v. McCurry*, 449 U.S. 90 (1980), the Supreme Court reviewed the requirements of the two preclusion doctrines in the context of a section 1983 civil rights action. The Court stated:

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case . . . .

In recent years . . . the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitigation of issues decided earlier in federal-court suits, and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case. But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case.

*Id.* at 94-95 (citations and footnotes omitted). For a discussion of these doctrines under the specific model presented by *Aikens* and *Crowder*, i.e., class action alleging violations of section 1983 followed by an action for damages brought by an individual member of the class, see Bodensteiner, *Application of Preclusion Principles to § 1983 Damage Actions After a Successful Class Action for Equitable Relief*, 17 VAL. U.L. REV. 347 (1983).

<sup>167</sup>687 F.2d 996 (7th Cir. 1982).

<sup>168</sup>371 F. Supp. 482 (N.D. Ind. 1974), *aff'd as modified*, 514 F.2d 55 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976).

2) Plaintiffs were denied rights under the first, fourth, eighth, ninth and fourteenth amendments because of their incarceration in two different administrative segregation units (I.D.U. and D.O. units) under deplorable conditions of health, nutrition, medical care, and recreation, as well as inadequate access to literature, legal and otherwise. In the D.O. unit, plaintiffs also complained of the spraying of the chemical MACE into occupied cells as a control tactic.

3) Plaintiffs were denied first, sixth and fourteenth amendment rights by the practice, at the state prison, of interfering with mail sent between prisoners and their attorneys.<sup>169</sup>

The United States District Court for the Northern District of Indiana held that minimum due process standards apply to all disciplinary transfers, absent an emergency, and outlined the required procedures.<sup>170</sup> The court also found that the conditions in the D.O. unit of administrative segregation violated the eighth amendment's ban on cruel and unusual punishment, stating: "The conditions therein existing are shockingly inhumane and have no place in today's penal programs. The conditions there threaten the sanity of the inmate and are abhorrent to any efforts at rehabilitation."<sup>171</sup> Finally, the court withheld judgment on the question of the censorship of literature and mail sent to and from inmates, pending the resolution of a similar question by the Seventh Circuit en banc.<sup>172</sup>

In *Crowder*, the plaintiff had been a member of the plaintiff class in *Aikens*.<sup>173</sup> He raised substantially the same due process, eighth amendment and censorship issues as had been raised by the plaintiffs in the preceding class action,<sup>174</sup> but sought damages under section 1983 rather than equitable relief. At trial, the district court directed a verdict for all defendants except the warden on grounds of lack of personal responsibility.<sup>175</sup> Further the district court removed from the jury's consideration all issues except the plaintiff's eighth amendment claim, on which the jury returned a verdict for the plaintiff.<sup>176</sup>

With respect to that claim, the evidence showed that the plaintiff spent four out of his seven years in prison confined to the D.O. unit of administrative segregation in the state prison. He alleged that the condition of the cell, coupled with the disproportionate amount of time he was forced to spend in administrative segregation violated the eighth amendment.<sup>177</sup>

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<sup>169</sup>371 F. Supp. at 486.

<sup>170</sup>*Id.* at 491-92. The Seventh Circuit approved these procedures with some modification. See 514 F.2d at 58-62.

<sup>171</sup>371 F. Supp. at 498.

<sup>172</sup>*Id.* at 499 (citing *Morales v. Schmidt*, 489 F.2d 1335 (7th Cir. 1973)).

<sup>173</sup>687 F.2d at 1008.

<sup>174</sup>See *id.* at 1000-01.

<sup>175</sup>*Id.* at 1001.

<sup>176</sup>*Id.* at 1001-02.

<sup>177</sup>*Id.* at 1001.

In the court of appeals the defendants argued that because of the plaintiff's participation in *Aikens*, he should have been barred by res judicata principles from bringing his present suit.<sup>178</sup> The appeals court held the defense waived because of the defendant's failure to raise a res judicata defense to the plaintiff's eighth amendment claim in the lower court.<sup>179</sup>

Even if the defense had been raised properly, the Seventh Circuit would have rejected it.<sup>180</sup> *Aikens* sought declaratory and injunctive relief only;<sup>181</sup> Crowder asked for damages against the prison officials in their individual capacities.<sup>182</sup> Due to the individual damage claims, the possible issue of qualified immunity, and the fact that Crowder's damages had not been fully incurred at the time he joined *Aikens*, the court found Crowder would not be precluded because of res judicata by an earlier class action in which only declaratory and injunctive relief were sought.<sup>183</sup>

In a similar tactic, Crowder raised collateral estoppel arguments in his suit to preclude the defendants from relitigating the constitutionality of the conditions.<sup>184</sup> The district court had refused to apply the doctrine, reasoning that the defendants were entitled to a jury trial in the present suit and the non-jury verdict in *Aikens* could not collaterally estop them from presenting eighth amendment arguments to jury.<sup>185</sup>

The court of appeals, however, noted that under *Parklane Hosiery Co. v. Shore*,<sup>186</sup> "a plaintiff in a subsequent legal proceeding may assert collateral estoppel based upon a prior equitable determination, provided that the defendant has had a 'full and fair' opportunity to litigate its claims in the prior action."<sup>187</sup> Because Crowder was a "real" plaintiff in the previous litigation, and because the defendants had every opportunity to litigate their eighth amendment liability and were not forced to litigate in an inconvenient forum, the appeals court held that Crowder could not be prevented from using collateral estoppel to bar relitigation of the constitutionality of the conditions.<sup>188</sup> On remand, the district court was instructed to allow collateral estoppel, but only to the extent allowed under *Parklane*.<sup>189</sup>

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<sup>178</sup>*Id.* at 1007-08.

<sup>179</sup>*Id.* at 1008.

<sup>180</sup>*Id.*

<sup>181</sup>See 514 F.2d at 56.

<sup>182</sup>687 F.2d at 1008.

<sup>183</sup>*Id.* at 1009. The Seventh Circuit's dicta is in line with other circuits' decisions. See, e.g., *Cotton v. Hutto*, 577 F.2d 453 (8th Cir. 1978); *Jones-Bey v. Caso*, 535 F.2d 1360 (2d Cir. 1976).

<sup>184</sup>687 F.2d at 1009.

<sup>185</sup>*Id.* at 1010.

<sup>186</sup>439 U.S. 322 (1979).

<sup>187</sup>687 F.2d at 1010 (citing 439 U.S. at 328, 332-33).

<sup>188</sup>687 F.2d at 1011. The court pointed out that this holding established the defendant's liability in this case; however, the issues of good faith and personal responsibility of the defendants remained to be litigated. *Id.*

<sup>189</sup>*Id.* at 1012. Under *Parklane*, collateral estoppel should be permitted provided the



3. *Standard for Personal Injury Claims Under Section 1983.*—In *Burr v. Duckworth*,<sup>190</sup> an inmate at the Indiana State Prison contended that he sustained personal injuries as a result of prison officials' alleged indifference to inmate violence and that such indifference constituted a violation of the eighth amendment.<sup>191</sup> The crucial issue in *Burr* was the standard against which the conduct of prison authorities will be measured when personal injury claims arising in prisoner petitions are brought under 42 U.S.C. § 1983.<sup>192</sup>

Plaintiff claimed the proper standard was that of negligence and argued that the defendants were negligent in failing to transfer him to another prison facility after he informed prison officials of his fear of attacks from other inmates and requested transfer from the facility.<sup>193</sup> No circuit court has adopted the negligence standard in regards to personal injury claims. Moreover, eighth amendment violations require a showing of deliberate indifference, not negligence.<sup>194</sup> Thus, had the prison officials manifested an actual intent to deprive the plaintiff of his rights, or knowingly acquiesced in the violation of the plaintiff's rights, the officials may have been liable. However, in *Burr*, safety precautions were taken to the extent possible by placing the plaintiff in protective segregation.<sup>195</sup> The plaintiff's refusal to inform officials of his prospective assailants could not be mutated into deliberate indifference on the defendant's part.<sup>196</sup>

Additionally, although the plaintiff had a right to protection within his facility, the prisoner had no constitutionally protected right or interest to be transferred from one facility to another within a corrections system.<sup>197</sup>

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issues have been fully and fairly adjudicated in a prior proceeding and nothing remains for trial either with or without a jury. 439 U.S. at 332-33.

The court of appeals also reversed the district court's directed verdict for defendants on the following issues: plaintiff's right to legal literature and correspondence with his attorney, 687 F.2d at 1004; his right to free exercise of religion, *id.*; his due process rights, *id.* at 1005; and the personal responsibility of two of the defendants concerning the first, eighth and fourteenth amendment claims, *id.*

<sup>190</sup>547 F. Supp. 192 (N.D. Ind. 1982).

<sup>191</sup>*Id.* at 194.

<sup>192</sup>To state a claim under section 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law and that it deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Id.* at 195. Because any act by the superintendent of the state prison would be under color of state law, the only issue was whether the defendant-superintendent's failure to transfer the plaintiff to another correctional facility, as requested by the plaintiff because of threats made on his life by other inmates, amounted to a deprivation of the plaintiff's eighth amendment right to be free from cruel and unusual punishment. *Id.* at 196.

<sup>193</sup>*Id.* at 196 n.2.

<sup>194</sup>*Id.* See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

<sup>195</sup>547 F. Supp. at 196.

<sup>196</sup>*Id.* at 197.

<sup>197</sup>*Id.* See *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976); *Montayne v. Haymes*, 427

Section 1983 requires liability to be predicated on the deprivation of a constitutionally protected right. Absent that, no liability can attach.<sup>198</sup>

*Burr* demonstrates the reluctance of the courts to involve the judiciary in issues that are not the business of federal judges, but more properly lie within the discretion of prison authorities. Without a showing that those officials acted recklessly or with actual intent in depriving a prisoner of a *constitutionally protected* right, no claim can rest under section 1983 for personal injuries.

#### D. Fourteenth Amendment—Equal Protection and Due Process

1. *Prisoner Correspondence and Damage Awards.*—A section 1983 action initiated over eight years ago by a prisoner alleging first and fourteenth amendment violations was brought closer to an end during this survey period after years in a judicial labyrinth. In *Owen v. Lash*,<sup>199</sup> retired Supreme Court Justice Potter Stewart, sitting by designation, wrote for the Seventh Circuit Court of Appeals and held that a denial of an inmate's right to correspond amounts to a substantive rights violation under the fourteenth amendment.<sup>200</sup> The significance of the case lies in its lengthy history, the puzzling rationale of the district court, and the dicta offered by the Seventh Circuit on a question of first impression.

From March 1973 to February 1974, while an inmate at the Indiana State Prison, Owen was denied the right to correspond with a newspaper reporter and two other individuals.<sup>201</sup> In response to Owen's suit for injunctive relief and damages, the district court declared the claims were barred by res judicata in light of *Aikens v. Lash*.<sup>202</sup> In the first appeal to the Seventh Circuit, the court ruled the claims were not barred by res judicata and ordered the district court to determine on remand if there existed a "rational basis" for the denial and further, whether the defendant was protected from individual liability by qualified immunity.<sup>203</sup>

On remand the district court ruled the state's justification for inhibiting Owen's correspondence did not "pass muster" and amounted to a violation of plaintiff's constitutional rights.<sup>204</sup> However, the district court found the rights violated were only "court created procedural due process rights,"<sup>205</sup> despite the fact that no paper filed in the suit ever mentioned

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U.S. 236, 242 (1976)(holding that a prisoner has no liberty interest protected by due process in remaining in a certain prison within a prison system).

<sup>198</sup>See *Parrat v. Taylor*, 451 U.S. 527, 535 (1981).

<sup>199</sup>682 F.2d 648 (7th Cir. 1982).

<sup>200</sup>*Id.*

<sup>201</sup>*Id.* at 650.

<sup>202</sup>371 F. Supp. 482 (N.D. Ind. 1974), *aff'd as modified*, 514 F.2d 55 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). See *supra* notes 169-72 and accompanying text.

<sup>203</sup>682 F.2d at 650-51.

<sup>204</sup>*Id.* at 651.

<sup>205</sup>*Id.*

procedural due process, nor had any party ever mentioned the right of procedural due process.<sup>206</sup> The district court held that when procedural due process rights are violated, only nominal damages in the sum of one dollar may be awarded in the absence of actual damages.<sup>207</sup> The judgment ordered was only against Lash in his official capacity, because the plaintiff allegedly failed to introduce evidence against Lash individually.<sup>208</sup>

The case was appealed again, this time before Justice Stewart. The Seventh Circuit was puzzled by the district court's conclusion that procedural rather than substantive rights had been violated since Owen alleged denial of his substantive correspondence rights—the right to send and receive letters and thereby communicate with the outside world—not the unconstitutionality of the manner in which the restriction had been imposed.<sup>209</sup>

The district court's ruling on individual and executive liability for damages was found to be equally confounding. Because the eleventh amendment bars any action for the recovery of money from the state in a section 1983 action, unless the states waives its immunity,<sup>210</sup> a damage award against Lash in his official capacity would, necessarily, be satisfied from state funds and therefore in violation of the eleventh amendment.<sup>211</sup> Absent waiver of immunity by the state it was error to award the nominal one dollar in damages.<sup>212</sup> Two questions still remained: 1) Given a proven violation of substantive rights, could Owen collect damages from Lash, individually, and, 2) if so, is Owen limited to recovering only the sum of one dollar?

A state prison official's exposure to personal liability in a section 1983 suit is controlled by the doctrine of qualified immunity which invokes a standard of negligence in assessing liability.<sup>213</sup> A state prison official is immune from liability unless "the official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .'"<sup>214</sup>

Warden Lash's signature appeared on most of the paperwork relating to the denial of Owen's rights; whether Lash knew or should have known that his conduct violated the constitutional norm, however, was never

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<sup>206</sup>*Id.* at 652.

<sup>207</sup>*Id.* at 651 (citing *Carey v. Piphus*, 435 U.S. 247 (1977)).

<sup>208</sup>682 F.2d at 651.

<sup>209</sup>*Id.*

<sup>210</sup>*Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>211</sup>682 F.2d at 654-55. Both parties in *Owen* agreed that the district court's decision violated the eleventh amendment. *Id.* at 655.

<sup>212</sup>*Id.* at 654-55.

<sup>213</sup>*See Procunier v. Navarette*, 434 U.S. 555 (1978).

<sup>214</sup>*Id.* at 562 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

discussed by the district court—even after specific instructions by the Seventh Circuit after the first appeal.<sup>215</sup> The Seventh Circuit remanded on the issue of qualified immunity.<sup>216</sup>

As to the second issue—the limitation of one dollar recovery if Lash, individually, is found liable for his action and not immune from suit—a question of first impression arises in this circuit. Under section 1983 could Owen recover more than nominal damages against Lash for deprivation of a substantive right if no actual injury can be shown? *Carey v. Piphus*<sup>217</sup> held expressly that in cases of *procedural* due process violations, plaintiffs who fail to prove actual injury are limited to nominal damages.<sup>218</sup> In instances where the deprivation is one of a substantive constitutional right, the *Carey* court stated the elements and prerequisites for recovery of damages will vary depending on the facts and the nature of the interest protected by the particular constitutional right in question.<sup>219</sup>

Clearly, the rights in *Owen* were substantive and could be distinguished from the procedural rights involved in *Carey*. However, the Seventh Circuit declined to decide whether a substantive rights violation would warrant a compensatory award in the absence of an actual injury. Instead, the court remanded with instructions for the district court to consider the issue should it find Lash, in his individual capacity, is not immune from liability.<sup>220</sup> Should the district court find qualified immunity applies

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<sup>215</sup>682 F.2d at 656. The circuit court stated that because the district court's ruling dismissing Owen's claim against Lash individually "is phrased in purely conclusory terms, without any explanation or citation to the record, it is somewhat difficult to discern the exact meaning of the dismissal." *Id.* at 655. However, the circuit court reasoned that it was "likely" that the district court had the doctrine of qualified immunity in mind when it dismissed the complaint against Lash individually, even though the district court failed to explain its action in those terms. *Id.* at 656. Justice Stewart stated that given the fact that Lash's signature appeared on most of the paperwork denying Owen's first amendment rights, and "[g]iven the complaint, the record, and the other judicial rulings in this case, it is hardly possible to read the District Court's decision as holding that Warden Lash was not even partly responsible for the proven deprivation of Owen's rights." *Id.* at 655. Still, Lash might not be personally liable for such deprivation because of the doctrine of qualified immunity.

<sup>216</sup>*Id.* at 656.

<sup>217</sup>435 U.S. 247 (1978).

<sup>218</sup>*Id.* at 266.

<sup>219</sup>*Id.* at 264-65. Circuit courts have split in their interpretation of *Carey*. The Fifth Circuit has held that only nominal damages are allowable for an infringement of first amendment liberty where no proof of actual injury exists. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In contrast, the Eighth Circuit allowed a damage award for physical harm, emotional and mental suffering, and for the violation of substantive constitutional rights of liberty and due process of law, noting that part of the injury was the loss of these rights themselves. *Herrera v. Valentine*, 653 F.2d 1220, 1227-28 (8th Cir. 1981). When compensatory awards are made, the Eighth Circuit has distinguished the substantive rights involved in the case before it from the procedural rights involved in *Carey*. See *id.* at 1230; see generally Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966 (1980).

<sup>220</sup>682 F.2d at 660.

to Lash in his individual capacity, the question of nominal or compensatory damages becomes moot.

2. *Disparate Treatment in Prisoner Security Status.*—In *Kincaid v. Duckworth*,<sup>221</sup> an inmate brought a civil rights action alleging deprivation of his equal protection and due process rights. Allegedly, an Indiana Department of Correction's regulation arbitrarily treated inmates convicted of murder and sentenced to life imprisonment differently and more harshly than inmates convicted of murder and sentenced to a term of years under the 1976 revised Indiana statute.<sup>222</sup>

Kincaid, who was convicted in 1975 and given a life sentence, was assigned the maximum security status. Under the department regulation, Kincaid was not entitled to seek a lesser security status until 1981.<sup>223</sup> However, an individual convicted of the same crime in late 1977 would have been able to seek the lesser status in 1979<sup>224</sup> because the individual could not have been given a life sentence since the revised criminal code repealed the life imprisonment sentence.<sup>225</sup>

Neither the district court nor the court of appeals found the disparate treatment of inmates to be a deprivation of equal protection. Both courts noted that classification of inmates is a matter of prison administration and management and that federal courts are reluctant to interfere with such decisions except in extreme circumstances.<sup>226</sup>

Still, statutory classifications which result in disparate treatment of similarly situated groups violate the equal protection clause if not rationally related to a legitimate articulated state purpose.<sup>227</sup> The majority in *Kincaid* accepted the "well known and universally recognized prison security

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<sup>221</sup>689 F.2d 702 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2126 (1983).

<sup>222</sup>The plaintiff was sentenced to life in prison on July 11, 1975 under IND. CODE § 35-13-4-1(a)(1976) (repealed effective October 1, 1977) (originally enacted by Act of Mar. 8, 1941, ch. 148, § 1, 1941 Ind. Acts 447). The 1976 revision of the Indiana Criminal Code repealed title 35, article 13 of the Code. Act of Feb. 25, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 718, 816. The 1976 revision also amended title 35 by adding a new article 50, *id.* § 8, 1976 Ind. Acts at 788. The effective date of this revision was to have been July 1, 1977, *id.* § 28, 1976 Ind. Acts at 817, but before that date title 35 was re-amended, essentially by amending Public Law Number 148. *See* Act of Apr. 12, 1977, Pub. L. No. 340, 1977 Ind. Acts 1533. The life imprisonment sentence having been repealed in 1976, the 1977 revision of the criminal code then substituted for it the term of years. *Id.* § 116, 1977 Ind. Acts at 1593 (presently codified at IND. CODE § 35-50-2-3 (1982)). The 1977 revision of the criminal code became effective October 1, 1977. *Id.* §§ 151, 152, 1977 Ind. Acts at 1611.

<sup>223</sup>Department of Correction Regulation IV (c)(1) provided that inmates serving a life sentence would not be eligible for minimum security status until after six years from date of admission. 689 F.2d at 703.

<sup>224</sup>IND. CODE § 35-4.1-5-3(c) (1982) vests discretion with the department in permitting a change of security status of persons sentenced for murder two years after date of admission.

<sup>225</sup>*See supra* note 221.

<sup>226</sup>689 F.2d at 704.

<sup>227</sup>*McGinnis v. Royster*, 410 U.S. 263, 270 (1973).

risks attending life termers' as rational reasons to justify the four year differential for eligibility of change of security status.<sup>228</sup>

Lamenting the lack of clearly articulated reasons for the disparate treatment, the dissent questioned whether the security risks attending life termers who have been convicted of murder are any greater than the security risk attending specific term inmates who have been convicted of the same crime yet who are treated differently by the regulation.<sup>229</sup> If, in fact, a rational basis exists it should be articulated in the record and not disguised under the foil of "inherent differences" between life termers and those sentenced for a term of years. The majority's determination appears especially harsh in respect that the plaintiff was not seeking an automatic right to attain the lesser status, but only the eligibility to seek that status.<sup>230</sup>

As to the prisoner's due process claim, the majority found no protected liberty interest of which the plaintiff was deprived.<sup>231</sup> No Indiana state law or regulation creates the right to a particular security classification. That classification rests solely within the discretion of the department. Thus, Kincaid's expectation of eligibility for reclassification, gained from what the majority termed a "misplaced" reliance upon the department's reproduction of regulations in the inmate's handbook, was too insubstantial to rise to the level of due process protection.<sup>232</sup>

3. *Appointed Counsel in Civil Proceedings.*—In two cases during the survey period,<sup>233</sup> the necessity of appointing counsel for indigent civil litigants in order to meet the dictates of due process was evaluated, resulting in the appointment of counsel in both instances.

In *Kennedy v. Wood*,<sup>234</sup> the Indiana Court of Appeals required the appointment of counsel for indigent defendants in paternity actions initiated as a result of Title IV-D of the Federal Social Security Act.<sup>235</sup> The court relied on the recent Supreme Court decision in *Lassiter v. Department of Social Services*,<sup>236</sup> regarding the appointment of counsel in parental

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<sup>228</sup>689 F.2d at 704.

<sup>229</sup>*Id.* at 706 (Pell, J., dissenting).

<sup>230</sup>*Id.* at 707.

<sup>231</sup>*Id.* at 704.

<sup>232</sup>*Id.* at 704-05.

<sup>233</sup>*Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982); *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3121 (U.S. July 2, 1983) (No. 83-153).

<sup>234</sup>439 N.E.2d 1367 (Ind. Ct. App. 1982).

<sup>235</sup>Title IV-D of the Social Security Act requires states to create or designate an agency to obtain and enforce support orders for children receiving AFDC payments, and to establish paternity, where necessary. 42 U.S.C. §§ 651-60 (1976); *see* IND. CODE §§ 12-1-6.1-1 to -21 (1982). Under the Indiana scheme, the state Department of Public Welfare contracts with county prosecuting attorneys to bring paternity actions in the name of recipients of public assistance. IND. CODE § 12-1-6.1-10 (1982). *See* 439 N.E.2d at 1368-69.

<sup>236</sup>452 U.S. 18 (1981).

rights termination proceedings, for the proper balancing test to be applied. As stated in *Lassiter*, there is a presumption against the right to appointed counsel in the absence of at least a *potential* deprivation of physical liberty.<sup>237</sup> Against this presumption are to be weighed the three factors, enumerated in *Mathews v. Eldridge*,<sup>238</sup> to be used in evaluating the mandates of procedural due process: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."<sup>239</sup>

Because no *direct* deprivation of liberty is involved in a civil paternity action, the court invoked the presumption against appointed counsel and weighed that against the *Mathews* factors. Citing *Little v. Streater*,<sup>240</sup> the court acknowledged the compelling private interests of both the putative father and the child involved in the creation of the parent-child relationship. The court of appeals considered not only the emotional, medical, and financial effects, but also the potential criminal liability for non-support which could be imposed on both the father<sup>241</sup> and the child.<sup>242</sup> The state's interest, on the other hand, were seen as primarily financial.<sup>243</sup> The court found that the state's financial interest, while legitimate, was "hardly significant enough to overcome the compelling private interests of the putative father and child."<sup>244</sup>

Finally, the risk of error in the absence of appointed counsel for indigent defendants was great in light of the state's intervention on behalf of the mother<sup>245</sup> and in light of the indigent defendant's constitutional right to a free blood grouping test,<sup>246</sup> which might be rendered meaningless without the aid of counsel. Thus, the private interests of the putative father and the child and the likelihood of an erroneous determination of paternity under current procedures were held to outweigh the state's financial interests and to require the appointment of free counsel despite

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<sup>237</sup>*Id.* at 25.

<sup>238</sup>424 U.S. 319 (1976).

<sup>239</sup>452 U.S. at 28 (citing *Mathews*, 424 U.S. at 335).

<sup>240</sup>452 U.S. 1 (1981)(holding that an indigent defendant in a paternity action initiated because of the dictates of Title IV-D has a right to a free blood grouping test).

<sup>241</sup>439 N.E.2d at 1370 (citing IND. CODE § 35-46-1-5 (1982)).

<sup>242</sup>439 N.E.2d at 1370-71 (citing IND. CODE § 35-46-1-7 (1982)).

<sup>243</sup>439 N.E.2d at 1371.

<sup>244</sup>*Id.* (footnote omitted).

<sup>245</sup>*Id.*

<sup>246</sup>*Id.* at 1372. At this stage of the opinion, i.e., the determination of the putative father's rights to indigent appointed counsel in a paternity proceeding, the court of appeals relied on *Little v. Streater*, 452 U.S. 1 (1981) for the proposition that an indigent putative father has a constitutional right to a free blood grouping test. 439 N.E.2d at 1372. Later in the opinion, deciding the issue because it was likely to recur in the retrial of the case, the court established that the right to such a test exists in Indiana for indigent defendants in paternity proceedings, relying again on *Little*, and on *Anderson v. Jacobs*, 68 Ohio St. 2d 67, 428 N.E.2d 419 (1981). 439 N.E.2d at 1373-74.

the presumption stated in *Lassiter*.<sup>247</sup> The court went even further to protect the rights of the putative father by holding that due process requires that the court advise any indigent defendant in this situation of his right to appointed counsel, rather than merely responding to articulated requests for the appointment of counsel.<sup>248</sup>

In the second case finding the right to appointed counsel, *Merritt v. Faulkner*,<sup>249</sup> the Seventh Circuit Court of Appeals reversed the District Court for the Northern District of Indiana and required the appointment of counsel for a blind, indigent prisoner pursuing a section 1983 action against prison officials.<sup>250</sup> In so doing, the court considered the five factors set forth in the 1981 case of *Maclin v. Freake*<sup>251</sup> to determine whether, in the exercise of its discretion, a trial court's refusal to appoint counsel to an indigent civil litigant "would result in fundamental unfairness impinging on due process rights."<sup>252</sup> These factors are:

- (1) [W]hether the merits of the indigent's claim are colorable;
- (2) the ability of the indigent plaintiff to investigate crucial facts;
- (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel;

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<sup>247</sup>439 N.E.2d at 1372.

<sup>248</sup>*Id.* at 1372-73. Two other states have, since *Lassiter*, evaluated their obligation to provide appointed counsel to indigent putative fathers under the same circumstances as those presented in *Kennedy*, reaching opposite results. In *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740 (Iowa 1982), the Iowa Supreme Court applied the *Lassiter* analysis, but found that the *Mathews* factors did *not* outweigh the presumption against appointed counsel, primarily because it believed that the right to a free blood grouping test reduced the risk of error to such a degree that the presence of counsel would not appreciably affect the outcome of paternity actions. *Id.* at 743. Four justices dissented, using essentially the same analysis as the Indiana Court of Appeals. *Id.* at 744 (Uhlenhopp, J., dissenting).

In contrast, the Pennsylvania Superior Court, in *Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982), again applying the same *Lassiter/Mathews* test, found that due process did require the right to appointed counsel. Their analysis differed somewhat from that of the Indiana Court of Appeals. First, because of the potentiality of a loss of liberty through future criminal contempt or non-support proceedings, the Pennsylvania court presumed the existence of a right to counsel, *id.* at 484-85, rather than presuming no right to counsel. Also, the Pennsylvania court, in assessing the state's interests under the second prong of the *Mathews* test, found that the state as well as the putative father and child had an interest in an accurate determination of paternity which would be well-served by the appointment of counsel for indigent defendants. *Id.* at 485.

<sup>249</sup>697 F.2d 761 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3121 (U.S. July 2, 1983) (No. 83-153).

<sup>250</sup>697 F.2d at 766.

<sup>251</sup>650 F.2d 885 (7th Cir. 1981) (per curiam).

<sup>252</sup>*LaClair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967), *cited in* *McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982); *Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1981) (per curiam); *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978).



- (4) the capability of the indigent litigant to present the case; and
- (5) the complexity of the legal issues raised by the complaint.<sup>253</sup>

The *Merritt* case clarified the factual circumstances which should merit appointment of counsel, in that the failure to appoint counsel for the plaintiff was considered a *clear* abuse of discretion.<sup>254</sup> In *Maclin*, the plaintiff was a paraplegic who, like Merritt, sued prison officials for deliberate indifference to his serious medical needs in violation of the eighth amendment.<sup>255</sup> In a 1982 case, *McKeever v. Israel*,<sup>256</sup> the Seventh Circuit Court of Appeals again required the appointment of counsel for an indigent plaintiff challenging a prison policy limiting the amount of mail a prisoner could take to and from court appearances.<sup>257</sup> McKeever also specified medical problems as the basis for his request for counsel.<sup>258</sup> Comparing these two cases with the *Merritt* case, a pattern emerges which indicates the type of civil litigant whom the Seventh Circuit deems entitled to court-appointed counsel.

The court clearly placed some weight on the factor of incarceration as reducing the ability of the litigant to investigate facts crucial to his case, but much more important was the presence of a physical handicap. For Judge Cudahy, Merritt's blindness was a decisive consideration.<sup>259</sup> In addition, all three cases involved complex medical and/or legal questions.

Judge Posner, in his dissent, re-asserted his belief that the Seventh Circuit is moving toward routine appointment of counsel in prisoner civil rights cases.<sup>260</sup> If prisoner civil rights cases are likely to present complex questions of constitutional law pursued by incarcerated persons who have virtually no ability to investigate their cases, Judge Posner's assessment of the current trend in this circuit may be completely accurate.

4. *Administrative Segregation.*—In *Love v. Duckworth*<sup>261</sup> the United State District Court for the Northern District of Indiana held that the

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<sup>253</sup>697 F.2d 764 (citing *Maclin*, 650 F.2d at 887-89).

<sup>254</sup>697 F.2d at 766.

<sup>255</sup>650 F.2d at 886.

<sup>256</sup>689 F.2d 1315 (7th Cir. 1982).

<sup>257</sup>*Id.* at 1316.

<sup>258</sup>*Id.* at 1321 and n.13.

<sup>259</sup>697 F.2d at 769 (Cudahy, J., concurring).

<sup>260</sup>*Id.* at 770-71 (Posner, J., dissenting); see *McKeever*, 689 F.2d at 1325 (Posner, J., dissenting). Much of Judge Posner's dissent was based on an economic analysis of the case. He reasoned that "a prisoner who has a good damages suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market." 697 F.2d at 769. Judge Cudahy concurred separately specifically to comment on Judge Posner's analysis: "Not entirely facetiously, it occurs to me that the barriers to entry into the prison litigation market might be very high. . . . Hence, I am not prepared to consign to the verdict of the marketplace the issue of prisoner representation; and this is, of course, not the law." *Id.* at 768-69.

<sup>261</sup>554 F. Supp. 1067 (N.D. Ind. 1983).

decision whether to place an Indiana prisoner in administrative segregation does not implicate any liberty interest protected by the due process clause of the fourteenth amendment. The court found no liberty interest because an Indiana prisoner has no legitimate, non-unilateral expectation that he will remain in the general prison population absent the occurrence of certain specified events.<sup>262</sup> The court found that the Indiana procedure permitted placement in administrative segregation at the discretion of prison officials rather than upon the happening of certain events or the finding of certain objective criteria.<sup>263</sup> The Indiana procedure was deemed to be discretionary and “for all practical purposes identical to the basis for inter-institutional transfers considered in *Meachum v. Fano*,”<sup>264</sup> found by the United States Supreme Court to implicate no liberty interest.<sup>265</sup> The court distinguished the Indiana procedure from the Pennsylvania procedure in *Hewitt v. Helms*,<sup>266</sup> held by the United States Court of Appeals for the Third Circuit to create a liberty interest because Pennsylvania prisoners could be placed in administrative segregation only upon the finding of specified objective criteria.<sup>267</sup>

The *Love* court further found that even if a liberty interest in remaining in the general prison population did exist, the prisoner received all the process due him. He appeared personally before the Classification Committee and was given the opportunity to be represented by a lay advocate and call witnesses on his own behalf.<sup>268</sup>

No mention was made in the opinion of the Indiana statute governing the decision to place a prisoner in administrative segregation.

An offender may be involuntarily segregated from the general population of a facility or program *if* the department *first* finds that segregation is *necessary* for the offender’s own physical safety or the physical safety of others.<sup>269</sup>

Although the language of the statute is not as clear as the “shall . . . must” language of the statute in *Hewitt*,<sup>270</sup> it does require a finding by the Department of Corrections of one of only two possible justifications

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<sup>262</sup>*Id.* at 1070.

<sup>263</sup>*Id.*

<sup>264</sup>*Id.*

<sup>265</sup>*Meachum v. Fano*, 427 U.S. 215 (1976). The decision in *Meachum* ultimately rested upon the prison officials’ “discretion to transfer [a prisoner] for whatever reason or for no reason at all.” *Id.* at 228. The reasons for inter-institutional transfers “often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.” *Id.* at 225, *quoted in Love*, 554 F. Supp. at 1070.

<sup>266</sup>655 F.2d 487 (3rd Cir. 1981), *rev’d on other grounds*, 103 S. Ct. 864 (1983).

<sup>267</sup>655 F.2d at 497.

<sup>268</sup>554 F. Supp. at 1070-71 (citing *Owen v. Heyne*, 473 F. Supp. 345 (N.D. Ind. 1978), *aff’d*, 605 F.2d 559 (7th Cir. 1979)).

<sup>269</sup>IND. CODE § 11-10-1-7 (1982) (emphasis added).

<sup>270</sup>*See* 103 S. Ct. at 871 n.6; *see infra* text accompanying note 275.

for segregation. As such, the statute would appear to create a non-unilateral expectation on the part of Indiana prisoners that they will remain in the general prison population unless the required findings are made.

Nevertheless, the result of *Love* was borne out one month later by the Supreme Court of the United States in *Hewitt v. Helms*.<sup>271</sup> The Court held that prior decisions compelled the conclusion that the due process clause does not, of itself, create a liberty interest in remaining in the general prison population.<sup>272</sup> "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."<sup>273</sup> Because "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration,"<sup>274</sup> it is within the sentence imposed and violates no liberty interest. The Court did, however, agree with the Third Circuit Court of Appeals that the state of Pennsylvania had created a liberty interest in confinement within the general prison population through the use of "shall . . . must" language in its procedural guidelines and through the requirement of findings of specified substantive predicates, such as "the need for control," or "the threat of a serious disturbance."<sup>275</sup>

Even in light of the existence of such a liberty interest, the Court held that the prisoner had received all the process due him by receiving notice of the charges against him and by having the opportunity to have his version reported as part of the record.<sup>276</sup> The Court concluded that, "an informal, nonadversary evidentiary review [is] sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him."<sup>277</sup>

In light of the *Hewitt* decision, the result in *Love* appears quite sound. Although there is a strong argument that Indiana has statutorily created a liberty interest in remaining in the general prison population,<sup>278</sup> the court's conclusion that in any case the prisoner received all the process due him is unquestionably correct as the procedure used afforded him greater procedural safeguards than those endorsed by the Supreme Court in *Hewitt*.

5. *Naming of Illegitimates.*—In *Doe v. Hancock County Board of*

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<sup>271</sup>103 S. Ct. 864 (1983).

<sup>272</sup>*Id.* at 869-70.

<sup>273</sup>*Id.* at 869 (quoting *Montayne v. Haymes*, 427 U.S. 236, 242 (1976)).

<sup>274</sup>103 S. Ct. at 870.

<sup>275</sup>*Id.* at 871.

<sup>276</sup>*Id.* at 874.

<sup>277</sup>*Id.*

<sup>278</sup>See *supra* text accompanying notes 269-70.

*Health*,<sup>279</sup> the Supreme Court of Indiana avoided, on procedural grounds,<sup>280</sup> a challenge to Indiana Code section 16-1-16-15, which requires that an illegitimate child be registered under his mother's surname.<sup>281</sup> The parents, though unmarried, lived together and wished to give their child the father's surname. The parents argued that the restriction on naming illegitimate children violated their constitutional rights to privacy and substantive due process, their right to participate freely in the selection of their child's name, and their right to equal protection.<sup>282</sup>

In his dissent to the dismissal of *Doe*, Justice Hunter pointed to both federal<sup>283</sup> and state court<sup>284</sup> decisions finding that the naming of one's child is a constitutionally protected right with which the state cannot arbitrarily interfere. Also, despite the fact that the statute made classifications based on illegitimacy and gender, which usually require a higher level of scrutiny, Justice Hunter found it necessary to apply only a low-level rational basis scrutiny to reject the state's asserted reasons for limiting the naming of illegitimate children.<sup>285</sup> He dismissed as meritless the state's interest in preventing fraud, tracing the child's "changing status," and protecting the confidentiality of the child's records. Nor were the state's interests in promoting marriage and family life, and in keeping vital statistics sufficient, in the opinion of Justice Hunter, to override the parents' right to name their child.<sup>286</sup> Justice Hunter would have found Indiana Code section 16-1-16-15 unconstitutional;<sup>287</sup> however, because of the procedural dismissal, this statute remains in effect.

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<sup>279</sup>436 N.E.2d 791 (Ind. 1982).

<sup>280</sup>Appellants timely perfected their appeal; however, appellees (Hancock County Board of Health) filed their brief in the Indiana Court of Appeals one day late. The court refused to accept the belated filing of the brief, resulting in the effective dismissal of the case under IND. R. APP. P. 8.1(A). Appellants filed a petition to transfer to the Supreme Court of Indiana. The petition was granted and the case dismissed. Justice Hunter dissented on the ground that dismissal "effectively deprives the appellants of their constitutional rights of appellate review" under the Indiana Constitution, article III, section 6. *Id.* at 791 (Hunter, J., dissenting to grant of petition to transfer and dismissal). *Cf.* Whittaker v. Burgauer, 144 Ind. App. 106, 111, 244 N.E.2d 445, 447 (1969) ("It is our opinion that dismissal of a cause is proper only when this court does not have jurisdiction of an appeal."). For a further discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 55, 75 (1984).

<sup>281</sup>IND. CODE § 16-1-16-15 (1982).

<sup>282</sup>436 N.E.2d at 792 (Hunter, J., dissenting to grant of petition to transfer and dismissal).

<sup>283</sup>*Id.* at 793 (citing *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979)).

<sup>284</sup>436 N.E.2d at 793 (Hunter, J., dissenting to grant of petition to transfer and dismissal) (citing *Jones v. McDowell*, 53 N.C. App. 434, 281 S.E.2d 192 (1981); *D'Ambrosio v. Rizzo*, 425 N.E.2d 369 (Mass. App. 1981); *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976)).

<sup>285</sup>436 N.E.2d at 794 (Hunter, J., dissenting to grant of petition to transfer and dismissal).

<sup>286</sup>*Id.* at 794-96.

<sup>287</sup>*Id.* at 796.



## V. Criminal Law and Procedure

STEPHEN J. JOHNSON\*

### A. Crimes

1. *Generally.*—During the survey period,<sup>1</sup> one law was enacted that will be of interest to all criminal law practitioners—a major revision of Indiana's drunk driving laws. This will be discussed in detail below. For the remainder of the 1983 legislation it is sufficient to note the following changes in substantive criminal laws. Rape and criminal deviate conduct are now Class A felonies if they result in serious bodily injury to a person other than the defendant.<sup>2</sup> A Class C felony was created for manufacturing, possessing, or transferring armor-piercing handgun ammunition.<sup>3</sup> Additionally, it is now an aggravating factor for purposes of sentencing to commit a forcible felony while wearing a garment designed to resist penetration of a bullet.<sup>4</sup> New offenses controlling animal fighting contests were enacted.<sup>5</sup> Special criminal mischief provisions for damaging religious structures, cemeteries, school property, or community centers were created.<sup>6</sup> The child exploitation statute was amended to punish the dissemination or exhibition of child pornography,<sup>7</sup> and an offense of "peeping" was made a Class B misdemeanor.<sup>8</sup> The public servant conflict of interest law was amended to require, among other things, that

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<sup>1</sup>Although the Indiana Legislature created a flurry of activity in the criminal law area this survey period, no major substantive or procedural changes in the criminal code were enacted. This Survey Article will therefore concentrate on the decisions of the Indiana appellate courts during the survey period. This has also been an active year for the United States Supreme Court in the criminal law area. However, except for a few instances where the Supreme Court decisions seem especially pertinent to recent Indiana cases, these will not be discussed.

<sup>2</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, §§ 23, 24, 1983 Ind. Acts 1943, 1962-63 (codified at IND. CODE §§ 35-42-4-1, -2 (Supp. 1983)).

<sup>3</sup>Act of Apr. 11, 1983, Pub. L. No. 332-1983, § 1, 1983 Ind. Acts 1979, 1979-81 (codified at IND. CODE § 35-47-5-11 (Supp. 1983)).

<sup>4</sup>Act of Apr. 11, 1983, Pub. L. No. 332-1983, § 2, 1983 Ind. Acts 1979, 1979 (codified at IND. CODE § 35-38-1-7 (Supp. 1983)).

<sup>5</sup>Act of Apr. 18, 1983, Pub. L. No. 331-1983, 1983 Ind. Acts 1978 (codified at IND. CODE § 35-46-3-2 (Supp. 1983)).

<sup>6</sup>Act of Apr. 11, 1983, Pub. L. No. 326-1983, 1983 Ind. Acts 1971 (codified at IND. CODE § 35-43-1-2 (Supp. 1983)).

<sup>7</sup>Act of Apr. 4, 1983, Pub. L. No. 325-1983, 1983 Ind. Acts 1970 (codified at IND. CODE § 35-42-4-4 (Supp. 1983)). Also, a new statutory procedure to deal with "indecent nuisances" was enacted. Act of Apr. 21, 1983, Pub. L. No. 310-1983, § 2, 1983 Ind. Acts 1855, 1855-60 (codified at IND. CODE §§ 34-1-52.5-1 to -8 (Supp. 1983)).

<sup>8</sup>Act of Apr. 22, 1983, Pub. L. No. 311-1983, § 31, 1983 Ind. Acts 1861, 1891 (codified at IND. CODE § 35-45-4-5 (Supp. 1983)).

a public servant make a disclosure of any pecuniary interest in, or derivation of profit from, a contract or purchase associated with the governmental entity that he serves.<sup>9</sup> It was made a Class A misdemeanor for a physician to perform an unlawful abortion.<sup>10</sup> This discussion is only a brief overview of a few of the changes in the substantive criminal law. Changes in procedure and in sentencing statutes will be discussed later.

2. *Drunk Driving.*—The most comprehensive revision of a criminal statute in the past year was the enactment of a new drunk driving law.<sup>11</sup> Several of its provisions are controversial and will, no doubt, be quickly challenged in the courts. First, it should be noted that the juvenile jurisdiction statute was amended so that many juvenile drunk driving offenders will be prosecuted in adult criminal courts.<sup>12</sup> Previously, the juvenile court had exclusive original jurisdiction over juveniles charged with driving under the influence.<sup>13</sup> Under the new law, the juvenile court will retain exclusive original jurisdiction over juveniles charged with felony drunk driving offenses, but juveniles sixteen and over who are charged with misdemeanor drunk driving offenses will be tried in adult criminal courts.

The first major change made by the new drunk driving law, Public Law 143-1983, is the definition of "intoxicated." Prior law defined the term to mean under the influence of alcohol, a controlled substance, or any combination of the two.<sup>14</sup> The new law provides that a driver can also be intoxicated by being under the influence of "any drug," other than alcohol or a controlled substance, or a combination of "drugs," alcohol, or controlled substances.<sup>15</sup> The new law relies on the definition of controlled substances in another statute,<sup>16</sup> but the term "drug" is not defined in the new law.<sup>17</sup> This was no doubt intended by the legislature to permit the courts to broadly define the term.

The next subsection of the new law defines the crimes of operating a vehicle while intoxicated. Following a national trend,<sup>18</sup> Indiana has adopted a *per se* law, that is, a person is guilty of a Class C misdemeanor if he "operates a vehicle with ten-hundredths percent (.10%), or more;

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<sup>9</sup>Act of Apr. 15, 1983, Pub. L. No. 329-1983, § 1, 1983 Ind. Acts 1974, 1974-76 (codified at IND. CODE § 35-44-1-3 (Supp. 1983)).

<sup>10</sup>Act of Apr. 15, 1983, Pub. L. No. 318-1983, 1983 Ind. Acts 1933 (codified at IND. CODE § 35-1-58.5-4 (Supp. 1983)).

<sup>11</sup>Act of Apr. 19, 1983, Pub. L. No. 143-1983, 1983 Ind. Acts 989 (codified at IND. CODE §§ 9-11-1-1 to -4-15 (Supp. 1983)).

<sup>12</sup>Act of Apr. 4, 1983, Pub. L. No. 287-1983, 1983 Ind. Acts 1782 (codified at IND. CODE § 31-6-2-1 (Supp. 1983)).

<sup>13</sup>IND. CODE § 31-6-2-1 (1982) (amended 1983).

<sup>14</sup>*Id.* § 9-4-1-54(a) (repealed 1983).

<sup>15</sup>*Id.* § 9-11-1-5 (Supp. 1983).

<sup>16</sup>*Id.* § 9-11-1-4; see *id.* § 35-48-1-1 (1982) (defining the term "controlled substances").

<sup>17</sup>The term "doing" is defined in the Controlled Substances Act, IND. CODE § 35-48-1-1 (1982).

<sup>18</sup>See generally 3 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES Ch. 33A (3d ed. 1982).

by weight of alcohol in his blood.”<sup>19</sup> This blood alcohol level is not merely evidence of intoxication, as it has been in the past,<sup>20</sup> and can be under the new law,<sup>21</sup> rather it is a crime in itself to operate a vehicle with this blood alcohol level. The per se law will probably be one of the most controversial provisions of the new drunk driving law.

The new law also retains driving while intoxicated as a Class A misdemeanor.<sup>22</sup> This raises the issue of whether the per se and driving while intoxicated offenses punish the same conduct, or whether one is an included offense of the other.<sup>23</sup> It appears that the per se offense may be, but is not necessarily, an included offense of driving while intoxicated. For example, if a person had a blood alcohol level of .15% he would violate both the per se law and the driving while intoxicated law. However, if the blood alcohol level were .07% he would not violate the per se law but might violate the driving while intoxicated provision.<sup>24</sup>

Both the per se and driving while intoxicated offenses are upgraded from misdemeanors to Class D felonies if the crime results in serious bodily injury,<sup>25</sup> and to Class C felonies if they result in the death of another person.<sup>26</sup> Additionally, both the per se offense and driving while intoxicated offenses are raised to Class D felonies if the driver has been convicted of driving while intoxicated in the last five years.<sup>27</sup> When a person is tried for a Class D felony because of a prior conviction the trial must be bifurcated as in an habitual offender proceeding.<sup>28</sup>

Public Law 143-1983 almost totally rewrote the implied consent law.<sup>29</sup> Under the new law, when a law enforcement officer stops a driver and has probable cause to believe the driver has committed a per se offense or is driving while intoxicated, the officer must offer the person a chemical test (although he need not offer it to an unconscious person).<sup>30</sup> In con-

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<sup>19</sup>IND. CODE § 9-11-2-1 (Supp. 1983).

<sup>20</sup>IND. CODE § 9-4-1-54(g)(1) (1982) (repealed 1983).

<sup>21</sup>*Id.* § 9-11-1-7 (Supp. 1983).

<sup>22</sup>*Id.* § 9-11-2-2.

<sup>23</sup>*See id.* § 35-41-1-16 (definition of “included offense”).

<sup>24</sup>*See State v. Watts*, 601 S.W.2d 617 (Mo. 1980) (per se offense not necessarily included offense of driving while intoxicated); *State v. Basinger*, 226 S.E.2d 216 (N.C. App. 1976) (finding that although statute defined the per se offense as an included offense of driving under the influence, it is only included when there is evidence that blood level was .10% or greater).

<sup>25</sup>IND. CODE § 9-11-2-4 (Supp. 1983).

<sup>26</sup>*Id.* § 9-11-2-5.

<sup>27</sup>*Id.* § 9-11-2-3. A later section defines “previous conviction” for purposes of this law and provides that a certified copy of the person’s driving record obtained from the bureau of motor vehicles or a certified copy of a court record constitutes prima facie evidence that the person had a previous conviction. *Id.* § 9-11-4-14.

<sup>28</sup>Act of Mar. 28, 1983, Pub. L. No. 324-1983, 1983 Ind. Acts 1969 (codified at IND. CODE § 35-38-1-19 (Supp. 1983)); *see also* IND. CODE § 35-50-2-8 (Supp. 1983) (habitual offender statute); *cf.* *Sweet v. State*, 439 N.E.2d 1144 (Ind. 1982).

<sup>29</sup>IND. CODE §§ 9-4-4.5-1 to -7 (1982) (repealed 1983).

<sup>30</sup>*Id.* § 9-11-4-2 (Supp. 1983).



trast to the former law,<sup>31</sup> the officer need not offer the chemical test before he can arrest the driver. This eliminates the issue that arose under the prior law of whether the person was arrested before he was offered a chemical test.<sup>32</sup>

The new law also provides that a law enforcement officer may offer more than one chemical test to the suspect. The suspect must consent to each or it will constitute a refusal under the implied consent law.<sup>33</sup> The number of chemical tests a suspect had to consent to was also a point of contention under the old law. The new statute will permit multiple testing under two circumstances. First, multiple tests are allowed if an obviously intoxicated person does not register any blood alcohol content on the breathalyzer. Because this situation will occur in the case of drug intoxication, the officer may then request the person to submit to a blood test. Multiple tests can also be administered if a person registers .10% blood alcohol content on the breathalyzer. The crucial question in this situation is the suspect's level of intoxication at the time he was driving. The officer may therefore request additional breathalyzer tests at timed intervals to determine whether the suspect's blood alcohol content is increasing or decreasing.

The new law sets a time limit for multiple testing by requiring that "all tests must be administered within three (3) hours after the officer had probable cause to believe the person violated IC 9-11-2."<sup>34</sup> The time that probable cause arose may become an issue, but in most cases it will coincide with the time the police officer requests the person to take a chemical test. However, the new law also provides that a suspect who refuses to submit to a chemical test "may be arrested for an offense under IC 9-11-2."<sup>35</sup> This awkward phrasing appears to mean that the refusal gives rise to probable cause for arrest. As explained earlier, however, the law enforcement officer must have probable cause before he offers the chemical test; the refusal, therefore, cannot furnish the probable cause. Additionally, following the lead of *South Dakota v. Neville*,<sup>36</sup> the statute provides that a person's refusal to submit to a chemical test is admissible evidence.<sup>37</sup>

When a person suspected of driving while intoxicated is offered a chemical test he has two obvious alternatives—take the chemical test or refuse to take it.<sup>38</sup> However, the legislature has created an incentive to

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<sup>31</sup>*Id.* § 9-4-4.5-3 (1982) (repealed 1983).

<sup>32</sup>*See Reidhaar v. State*, 165 Ind. App. 307, 332 N.E.2d 117 (1975).

<sup>33</sup>IND. CODE § 9-11-4-2 (Supp. 1983).

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* § 9-11-4-3(c).

<sup>36</sup>103 S.Ct. 916 (1983); *see also*, *Allredge v. State*, 239 Ind. 256, 263-70, 156 N.E.2d 888, 891-94 (1959).

<sup>37</sup>IND. CODE § 9-11-4-3(d) (Supp. 1983).

<sup>38</sup>The refusal may be demonstrated by conduct as well as words, *Thacker v. State*, 441 N.E.2d 708 (Ind. Ct. App. 1982); *Jaremczuk v. State*, 177 Ind. App. 628, 380 N.E.2d

take the test. If the person takes the test and it results in prima facie evidence that he was intoxicated (.10% blood alcohol content),<sup>39</sup> then the bureau of motor vehicles will suspend *before trial* the person's driving privileges for 180 days or until the case is disposed of, whichever occurs first.<sup>40</sup> However, if the person refuses to submit to a chemical test, the bureau will suspend driving privileges for one year, *before trial* or a hearing.<sup>41</sup>

If the driver refuses a chemical test after it is offered by the police officer, the officer must advise the person that his refusal will result in suspension of his driving privileges.<sup>42</sup> If the person continues to refuse after being so advised, or if he submits to the chemical test and it results in prima facie evidence of intoxication,<sup>43</sup> the officer will take the person's driving license or permit and give the person a receipt for it.<sup>44</sup> The person will also be arrested at this point, if he has not already been.<sup>45</sup> If the chemical test indicates only "relevant evidence" that the person is intoxicated (.05%-.10% blood alcohol content),<sup>46</sup> then he *may* be arrested.<sup>47</sup> Additionally, the new law deleted a troublesome provision in the old law which provided that a person could not be arrested or charged with driving under the influence if the chemical test revealed that his blood alcohol content was .05% or below.<sup>48</sup> This permitted some persons obviously intoxicated, but probably under the influence of drugs, to go free.

After the driver has been arrested, and the officer has taken his driver's license, the officer will submit a probable cause affidavit to the prosecuting attorney of the county where the offense occurred.<sup>49</sup> This sworn affidavit must set forth the grounds for the officer's belief that the arrested person was violating the drunk driving law, state that the person was arrested for this violation, and state that the person either refused to submit to a chemical test or did submit to a chemical test which

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615 (1978), and by requesting a lawyer, *Steward v. State*, 436 N.E.2d 859 (Ind. Ct. App. 1982); *Davis v. State*, 174 Ind. App. 433, 367 N.E.2d 1163 (1977).

<sup>39</sup>The definition of "prima facie evidence of intoxication" is found at IND. CODE § 9-11-1-7 (Supp. 1983).

<sup>40</sup>*Id.* § 9-11-4-9(b).

<sup>41</sup>*Id.* § 9-11-4-9(a).

<sup>42</sup>*Id.* § 9-11-4-7(a). Although the recent decision of *Gibbs v. State*, 444 N.E.2d 893 (Ind. Ct. App. 1983), holding a drunk driving suspect must be advised of the consequences of his refusal for there to be a "knowing" refusal, was based on language in the former implied consent law, IND. CODE § 9-4-4.5-4(e) (1982) (repealed 1983), this section of the new law appears to comply with *Gibbs*.

<sup>43</sup>IND. CODE § 9-11-1-7 (Supp. 1983).

<sup>44</sup>*Id.* § 9-11-4-7(b)(1).

<sup>45</sup>*Id.* § 9-11-4-3(b), (c).

<sup>46</sup>*Id.* § 9-11-4-3(a).

<sup>47</sup>*Id.* § 9-11-4-3(b).

<sup>48</sup>*Id.* § 9-4-1-54(g)(3) (1982) (repealed 1983).

<sup>49</sup>*Id.* § 9-11-4-7(b)(2) (Supp. 1983).

revealed prima facie evidence of intoxication.<sup>50</sup>

At this point the prosecuting attorney has discretion to decide whether to proceed through the courts with the case or whether to require a first time offender to participate in a pre-trial diversion program.<sup>51</sup> However, the law requires that a judicial officer determine whether there was probable cause to believe that the person violated the drunk driving law.<sup>52</sup> If the judge determines probable cause existed, the person's drivers license and a copy of the probable cause affidavit are delivered to the circuit court clerk,<sup>53</sup> who sends the documents to the bureau of motor vehicles.<sup>54</sup> If the bureau suspends driving privileges, either because a suspect refused to submit to a chemical test,<sup>55</sup> or because the test revealed a prima facie level of intoxication,<sup>56</sup> the bureau must notify the person of the suspension and his right to judicial review.<sup>57</sup> The suspect is entitled to a "prompt" judicial hearing on the suspension, but the hearing is limited to the issues of whether the person refused to submit to the chemical test and whether a judicial officer made the required probable cause finding, not whether the finding was proper.<sup>58</sup> Driving privileges can also be reinstated if all of the pending charges for a violation have been dismissed and the prosecuting attorney states on the record that they will not be refiled.<sup>59</sup> It is important to emphasize that the new law provides for the suspension of driving privileges *before* any kind of trial or judicial hearing, other than the probable cause determination. This is an automatic administrative suspension by the bureau of motor vehicles, not suspension as the result of a court order. This provision in the new law will probably be as controversial as the per se law, if not more so.

The new law also amended a number of statutes which govern the penalties imposed for violations of the drunk driving laws. A first offense of the per se crime is a Class C misdemeanor<sup>60</sup> and a first offense of driving while intoxicated is a Class A misdemeanor,<sup>61</sup> if neither result in serious bodily injury or death to another person.<sup>62</sup> Upon a first conviction for either offense, the trial court will recommend suspension of driving privileges for a fixed period of ninety days to two years. The suspect is entitled to credit for any period of pre-trial suspension, unless the suspen-

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<sup>50</sup>*Id.* § 9-11-4-8(c).

<sup>51</sup>*Id.* § 33-14-1-7 (1982).

<sup>52</sup>*Id.* § 9-11-4-8(a) (Supp. 1983).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* § 9-11-4-8(b).

<sup>55</sup>*Id.* § 9-11-4-9(a).

<sup>56</sup>*Id.* § 9-11-4-9(b).

<sup>57</sup>*Id.* § 9-11-4-9(c).

<sup>58</sup>*Id.* § 9-11-4-10.

<sup>59</sup>*Id.* § 9-11-4-11.

<sup>60</sup>*Id.* § 9-11-2-1.

<sup>61</sup>*Id.* § 9-11-2-2.

<sup>62</sup>*See id.* § 9-11-2-4 (Class D felony if violation results in serious bodily injury); *id.* § 9-11-2-5 (Class C felony if violation results in death).

sion was the result of a refusal to submit to a chemical test.<sup>63</sup> The trial court may also withhold execution of any part of a sentence suspending driving privileges and place the defendant on probation for 180 days.<sup>64</sup> Part of this probation includes a restricted license.<sup>65</sup> However, even when probation is granted, the person's driving privileges must be suspended for at least thirty days,<sup>66</sup> something not previously required. A first offender may also still receive alcohol or drug abuse treatment.<sup>67</sup>

Both the *per se* crime and driving while intoxicated are Class D felonies if the defendant has been convicted of either of these crimes within the five years immediately preceeding the second conviction.<sup>68</sup> In this situation, the court must recommend suspension of driving privileges for one to two years, with the person still being entitled to credit for a pre-trial suspension.<sup>69</sup> Additionally, the person must be imprisoned for five days or ordered to perform ten days of community service.<sup>70</sup> At least two days of a five day sentence of imprisonment must be served consecutively, and the sentence must be served within six months from the date of sentencing.<sup>71</sup> Additionally, a second offender is not eligible for dismissal of charges to participate in a drug or alcohol abuse program if he previously participated in one.<sup>72</sup>

The *per se* offense and the pre-trial administrative suspension of driving privileges are two of the most controversial provisions of the new drunk driving law and will no doubt be challenged.<sup>73</sup> The *per se* offense may be challenged on the basis that the .10% blood alcohol element is unconstitutionally vague because, without conducting his own chemical test continually, a driver cannot know when his blood alcohol content reaches the illegal level. Therefore, he cannot conform his conduct to the requirements of the law. Proponents of this argument will find support in a recent California decision which held California's *per se* law unconstitutional for this reason.<sup>74</sup> However, arrayed against this solitary decision are many decisions from other jurisdictions which have upheld *per*

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<sup>63</sup>*Id.* § 9-11-3-1(a). Under prior law the minimum period of suspension was 60 days. *Id.* § 9-4-1-54(c) (1982) (repealed 1983).

<sup>64</sup>*Id.* § 9-11-3-1(b) (Supp. 1983). The probation period was one year under prior law. *Id.* § 9-4-1-54(c) (1982) (repealed 1983).

<sup>65</sup>*Id.* § 9-11-3-1(c)(3) (Supp. 1983).

<sup>66</sup>*Id.* § 9-11-3-2.

<sup>67</sup>*Id.* § 16-13-6.1-15.1.

<sup>68</sup>*Id.* § 9-11-2-3.

<sup>69</sup>*Id.* § 9-11-3-3.

<sup>70</sup>*Id.* § 9-11-3-4(a). The community service provision is new.

<sup>71</sup>*Id.* § 9-11-3-4(b).

<sup>72</sup>*Id.* § 16-13-6.1-15.1(e).

<sup>73</sup>It should be emphasized that with many of the arguments that follow the author is not merely setting up straw men to knock down, but is relying on attacks against similar legislation in other jurisdictions.

<sup>74</sup>*People v. Alfaro*, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983) (opinion published in advance sheet at 192 Cal. Rptr. 178-84, but was withdrawn from the bound volume).

se laws against the same challenge.<sup>75</sup> Indeed, driving while intoxicated offenses have traditionally been viewed as "strict liability crimes."<sup>76</sup> As such, it is not necessary for the driver to intend to be drunk and drive or to know that he is drunk when he is driving. Further, the same kind of vagueness challenge has been made against statutory presumptions of intoxication arising from certain blood alcohol levels, and such statutes have been sustained against this constitutional attack.<sup>77</sup> Therefore, the adequate notice or unconstitutionally vague argument is not likely to be a successful challenge to the Indiana per se statute.

It has also been argued that per se statutes create an unconstitutional "mandatory presumption" of guilt from a certain blood alcohol level.<sup>78</sup> This presumption of guilt contravenes the strongly held tenet that the accused is presumed innocent until proven guilty beyond a reasonable doubt. However, as one court has stated: "The statute does not presume, it defines."<sup>79</sup> The argument that the per se law contains a mandatory presumption of guilt ignores the plain import of the law, which is to define a new crime.

In another case it was contended that per se laws deprive a defendant of due process and the right to confrontation because his guilt will generally be established by a mechanical device, such as a breathalyzer.<sup>80</sup> The Alaska Court of Appeals rejected this argument, stating that "[b]reathalyzer test results, like any other evidence, may be subject to attack and disproof."<sup>81</sup> It has also been argued that the presence of both a per se law and a driving under the influence law, with different penalties for each, punishes essentially the same conduct but denies equal protection by permitting a prosecuting attorney to choose which charge to file. This argument has also been rejected.<sup>82</sup>

As can be seen from this brief discussion, successful constitutional attacks against the per se statute are unlikely. A more promising challenge

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<sup>75</sup>E.g., *Van Brunt v. State*, 646 P.2d 872 (Alaska Ct. App. 1982); *Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *Greaves v. State*, 528 P.2d 805 (Utah 1974); *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

<sup>76</sup>*Morgan v. Municipality of Anchorage*, 643 P.2d 691 (Alaska Ct. App. 1982); *State v. Grimsley*, 3 Ohio App. 3d 265, 444 N.E.2d 1071 (1982); *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

<sup>77</sup>*People v. Perkins*, 126 Cal. App. 3d Supp. 12, 179 Cal. Rptr. 431 (1981); *People v. Cruz*, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).

<sup>78</sup>Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301 (1983); Comment, *Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?*, 10 PEPPERDINE L. REV. 91 (1982).

<sup>79</sup>*State v. Franco*, 96 Wash. 2d 816, 823, 639 P.2d 1320, 1323 (1982); see also *Coxe v. State*, 281 A.2d 606 (Del. 1971); *State v. Ball*, 264 S.E.2d 844 (W. Va. 1980).

<sup>80</sup>*Cooley v. Municipality of Anchorage*, 649 P.2d 251 (Alaska Ct. App. 1982).

<sup>81</sup>*Id.* at 254-55.

<sup>82</sup>*State v. Watts*, 601 S.W.2d 617 (Mo. 1980).

might lie in a challenge to the sufficiency of the evidence when the blood alcohol level is measured exactly at .10%.<sup>83</sup>

The other provision of the new drunk driving law likely to be challenged is the pre-trial automatic administrative suspension of a person's driving privileges if he either refuses to submit to a chemical test, or submits and the test reveals a blood alcohol level of .10% or more. The constitutionality of this procedure will be determined by measuring the Indiana procedure against the Massachusetts system permitting pre-trial suspension of driving privileges for refusal to take a chemical test that the United States Supreme Court approved in *Mackey v. Montrym*.<sup>84</sup> Additionally, statutory systems similar to Indiana's new law have been challenged because a more severe penalty, in terms of suspension of driving privileges, is imposed on a person who refuses a chemical test compared to one who takes the test and "fails" it. It has been held that this is a reasonable and constitutional approach to encourage drivers to submit to a chemical test.<sup>85</sup>

3. *Assisting a Criminal*.—An infrequently prosecuted crime received an interesting interpretation last year in *Taylor v. State*.<sup>86</sup> The defendant was charged with assisting a criminal,<sup>87</sup> because of her alleged efforts to harbor or conceal a fugitive. Police officers went to a residence jointly occupied by the defendant Taylor and a man named Lipscomb to serve an arrest warrant on a Louis Jordan. Both Taylor and Lipscomb told the police they neither knew Jordan nor knew of his whereabouts. However, a search of the house uncovered Jordan hiding in a trunk in the living room.

The second district court of appeals quoted prior case law which stated that to "assist" a criminal a person must perform "some positive, affirmative act intended to help or aid someone to escape arrest, capture, or punishment."<sup>88</sup> The court found that Taylor's statement to the police that she did not know of Jordan or his whereabouts would have been a sufficient affirmative act if the State could have shown that Taylor knew of Jordan's presence in the house. However, the court held that because Taylor's possessory interest in the house and her presence there were nonexclusive, the evidence was not sufficient to permit an inference of her knowledge without other facts being present. The court then listed a

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<sup>83</sup>See *People v. Campos*, 138 Cal. App. 3d Supp. 1, 188 Cal. Rptr. 366 (1982); *State v. Boehmer*, 613 P.2d 916 (Hawaii Ct. App. 1980); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). But see *State v. Rucker*, 297 A.2d 400 (Del. Super. Ct. 1972).

<sup>84</sup>443 U.S. 1 (1979); see also *Illinois v. Batchelder*, 103 S.Ct. 3513 (1983) (*Mackey* analysis is controlling regarding suspension without a hearing).

<sup>85</sup>*Walker v. Department of Motor Vehicles*, 274 Cal. App. 2d 793, 79 Cal. Rptr. 433 (1969); *Augustino v. Colorado Dep't of Revenue*, 193 Colo. 273, 565 P.2d 933 (1977).

<sup>86</sup>445 N.E.2d 1025 (Ind. Ct. App. 1983).

<sup>87</sup>IND. CODE § 35-44-3-2 (1982).

<sup>88</sup>445 N.E.2d at 1027 (quoting *Dennis v. State*, 230 Ind. 210, 217, 102 N.E.2d 650, 654 (1952)).

number of facts which, in addition to a possessory interest and presence in the house, might show knowledge of a fugitive's presence.<sup>89</sup>

4. *Burglary*.—In *Watt v. State*,<sup>90</sup> the term "dwelling" in the burglary statute received an enlightening interpretation. The defendant had committed the offense of burglary<sup>91</sup> but contended on appeal that the State had not proven a Class B burglary because the State failed to prove that the burglarized structure was a "dwelling." The elderly owner of the house had resided there for fifty-five years. However, she had been ill and was residing in a convalescent home at the time of the offense. Her daughter had been assigned power of attorney over her mother's affairs and worked at her mother's house nearly every day, redecorating and renovating the house. Clothing, furniture, and other items belonging to the owner remained in the house.

The court of appeals noted that past Indiana decisions had defined a "dwelling" as a "'home'—a settled residence house for a family and their personal possessions."<sup>92</sup> The court also commented that previous Indiana decisions had found vacant houses or vacation homes not to be dwellings. However, emphasizing the victim's fifty-five years of residence and evidence indicating that she intended to return to the house, the court of appeals held that the house constituted a "dwelling" under the facts of this case.<sup>93</sup>

5. *Child Neglect*.—A split in the districts of the court of appeals over the mens rea requirement for child neglect was revealed in *Ware v. State*.<sup>94</sup> The issue was whether the element "knowingly" in the neglect statute<sup>95</sup> was intended to be an objective or a subjective mens rea requirement. That is, should the question of whether a parent knowingly neglected his child be determined by reference to a community standard or a

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<sup>89</sup>The examples which the court provided included:

1) the length of time the defendant and the fugitive were within the dwelling before the officer's presence was known, 2) the place the fugitive was hidden (e.g., in a room in which the defendant was located or to which the defendant had sole access); 3) the fugitive's secretion in a room where his presence and activity were available to defendant's senses of sight or sound; 4) the existence of a relationship between or among the parties (e.g., a familial or romantic relationship between Taylor and Jordan); 5) the reasons the police officers had for going to the house where the fugitive was found; 6) the length of time the dwelling was under surveillance by the law enforcement authorities; or 7) the physical layout of the house (e.g., openness of the dwelling or open doors). This listing is not exhaustive but merely illustrative.

445 N.E.2d at 1027 (footnote omitted).

<sup>90</sup>446 N.E.2d 644 (Ind. Ct. App. 1983).

<sup>91</sup>IND. CODE § 35-43-2-1 (1982).

<sup>92</sup>446 N.E.2d at 645.

<sup>93</sup>The court quoted the poet Edgar Guest: "It takes a heap o' living in a house t' make it home." *Id.*

<sup>94</sup>441 N.E.2d 20 (Ind. Ct. App. 1982).

<sup>95</sup>IND. CODE § 35-46-1-4 (1982).

reasonable parent standard, or by reference to what the particular parent actually knew? In *Ware*, a woman left her seven-year-old daughter in the care of her boyfriend, who had sexual intercourse with the daughter. The mother continued to permit her boyfriend to frequent her apartment after she apparently knew about the rape.

The second district court of appeals noted that prior to 1976 neglect was defined as having an objective mens rea<sup>96</sup> and continued to be so defined by the first district court of appeals.<sup>97</sup> The second district, however, ruled that the definition of “knowingly” contained in the new penal code<sup>98</sup> was essentially a subjective standard, meaning that “ ‘the accused person knew what he was about, and, possessing such knowledge, proceeded to commit the crime of which he is charged.’ ”<sup>99</sup> The second district concluded that the subjective standard was the correct one and held that the defendant in this case was guilty of neglect because she continued to permit her boyfriend to spend three or four nights a week in her apartment after she learned about the rape.<sup>100</sup>

6. *Conspiracy*.—In *McBride v. State*,<sup>101</sup> the fourth district court of appeals enunciated a limitation on conspiracy prosecutions. The defendant in this case sold a stolen vehicle to an undercover officer after they had settled on a price. The defendant was convicted of conspiracy to commit theft. The court first reasoned that a charge of conspiracy to commit theft was sufficient to include a charge of conspiracy to dispose of stolen property. In reversing the conviction, however, the court of appeals said that a conspiracy requires two intents—an intent to commit the felony and an intent to agree to commit the felony. The only intent proved by the State in this case was the intent to commit the felony. In *McBride*, the participants in the sale met for the first time at the time of the sale. There was no prior agreement. The sales agreement, therefore, only proved that the defendant intended to commit the felony of theft. The court held that to support a conspiracy conviction there must be proof of an addi-

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<sup>96</sup>441 N.E.2d at 22 (citing *Eaglen v. State*, 249 Ind. 144, 231 N.E.2d 147 (1967)).

<sup>97</sup>441 N.E.2d at 23 (citing *Smith v. State*, 408 N.E.2d 614 (Ind. Ct. App. 1980)).

<sup>98</sup>IND. CODE § 35-41-2-2 (1982).

<sup>99</sup>441 N.E.2d at 22 (quoting *State v. Bridgewater*, 171 Ind. 1, 8, 85 N.E. 715, 718 (1908)).

<sup>100</sup>Surely, such conduct would also violate an objective standard since a reasonable parent possessing such knowledge would have not permitted the boyfriend to continue overnight visits. The second district seemed to be saying that the objective standard would mean that the trier of fact must evaluate the parent's conduct in somewhat of a vacuum, without reference to what the particular parent in the case actually knew. Apparently the objective standard could permit a jury to determine whether or not the accused acted as a reasonable parent in light of what she knew.

It should also be noted that in child abuse prosecutions involving the murder statute, the Indiana Supreme Court has construed “knowingly” to be synonymous with “purposely” in prior murder statutes. *Horne v. State*, 445 N.E.2d 976 (Ind. 1983); *Burkhalter v. State*, 397 N.E.2d 596 (Ind. 1979).

<sup>101</sup>440 N.E.2d 1135 (Ind. Ct. App. 1982).



tional understanding between the parties beyond the mere sales agreement.

7. *Drugs.*—A conflict among the districts of the court of appeals was demonstrated by the fourth district court of appeals' decision in *Romack v. State*.<sup>102</sup> In *Romack*, the defendant was convicted of selling over thirty grams of marijuana, a Class D felony. He contended on appeal that without a quantitative analysis of the marijuana that was seized, the State could not determine the purity of the marijuana and could not, therefore, prove that he sold over thirty grams of "pure" marijuana. This dispute arose because the first subsection of the dealing statute prohibits manufacturing, delivering, or possessing with intent to deliver marijuana "pure or adulterated,"<sup>103</sup> a Class A misdemeanor. Under the second subsection of the statute, however, if the amount of marijuana is over thirty grams and less than ten pounds, the offense is a Class D felony.<sup>104</sup> The first district court of appeals had interpreted the "pure or adulterated" language to carry over into the second subsection,<sup>105</sup> so that it was unnecessary for the State to prove that the defendant sold over thirty grams of "pure" marijuana.

In *Romack*, the fourth district disagreed with this interpretation and stated that because the legislature did not specifically include the language "pure or adulterated" in the penalty enhancement subsection, the State must prove more than thirty grams of unadulterated marijuana to obtain a Class D felony.<sup>106</sup> The fourth district nevertheless found that the defendant sold more than thirty grams of marijuana because the police chemist testified that the total weight of the drug seized was 427 grams, that the small portions she tested were marijuana, and that in her opinion at least thirty grams of the substance was marijuana. The court refused to impose a requirement for a quantitative analysis in every case.

In 1983, the Indiana General Assembly responded to earlier cases imposing purity requirements<sup>107</sup> by adding the phrase "pure or adulterated" to several provisions in the Controlled Substances Act.<sup>108</sup> These amendments make it unlawful to possess cocaine or a Schedule I or II narcotic drug "pure or adulterated" and a Class C felony if the amount is more than three grams "pure or adulterated."<sup>109</sup> Additionally, it will be a Class D felony to possess controlled substances classified in Schedules I-V (except marijuana or hashish) in a "pure or adulterated" form.<sup>110</sup> Finally, the law

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<sup>102</sup>446 N.E.2d 1346 (Ind. Ct. App. 1983).

<sup>103</sup>IND. CODE § 35-48-4-10(a) (1982).

<sup>104</sup>*Id.* § 35-48-4-10(b).

<sup>105</sup>*Grogg v. State*, 417 N.E.2d 1175 (Ind. Ct. App. 1981).

<sup>106</sup>446 N.E.2d at 1353; see also *Jones v. State*, 435 N.E.2d 616 (Ind. Ct. App. 1982) (wherein the second district also interpreted the statute as the fourth district did in *Romack*).

<sup>107</sup>*E.g.*, *Hutcherson v. State*, 178 Ind. App. 8, 381 N.E.2d 877 (1978).

<sup>108</sup>Act of Apr. 15, 1983, Pub. L. No. 138-1983, §§ 3, 4, 5, 1983 Ind. Act. 980, 981 (codified at IND. CODE §§ 35-48-4-6, 35-48-4-7, 35-48-4-11 (Supp. 1983)).

<sup>109</sup>IND. CODE § 35-48-4-6 (Supp. 1983).

<sup>110</sup>*Id.* § 35-48-4-7.

has been amended so that it is a Class A misdemeanor to possess marijuana, hash oil, or hashish "pure or adulterated."<sup>111</sup> However, the new law did not amend the penalty enhancement sections of either the marijuana possession or marijuana dealing statutes, which were at issue in *Romack*. Therefore the question of whether the penalty enhancement provision for over thirty grams of marijuana requires proof of more than thirty grams of "pure" marijuana remains unsettled.

8. *Homicide*.—In *Head v. State*,<sup>112</sup> the Indiana Supreme Court concluded that attempted felony murder is an impossible offense. The felony murder doctrine provides that when a killing occurs during the perpetration or attempted perpetration of an inherently dangerous felony, the criminal, as a matter of law, acts with the culpability from which the mens rea for murder can be inferred. In Indiana, the felony murder rule has been statutorily limited to the killing of another while committing or attempting to commit seven specified crimes.<sup>113</sup> In *Head*, the court concluded that the commission or attempted commission of one of the underlying felonies cannot be extended to supply the mens rea for an attempted murder charge where no death occurs. This is so because a specific intent to kill is one element of the crime of attempted murder.

The court retained the principle that the State, in proving a felony murder charge, need only establish that the defendant intended to commit the underlying felony; no evidence of an intent to kill need be introduced. The majority also commented that increased punishment may be imposed on the perpetrator of one of the seven listed felonies if the offense results in bodily injury,<sup>114</sup> and that there is no requirement that there be an *intent* to inflict bodily injury.

Despite its ruling that there could be no crime of attempted felony murder, the supreme court held that the trial court did not err in denying the defendant's motion to dismiss the charging information on this ground. Although the information erroneously cited both the felony murder statute<sup>115</sup> and the attempted murder statute,<sup>116</sup> it contained all the elements necessary to allege attempted murder. The defendant, therefore, was adequately advised of the charges against him. However, the court held that the trial court did err in its jury instructions. The trial court, consistent with the information, gave erroneous preliminary instructions on the attempted murder charge, which included elements of the felony murder rule, but omitted the element of specific intent to kill. In final instruc-

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<sup>111</sup>*Id.* § 35-48-4-11.

<sup>112</sup>443 N.E.2d 44 (Ind. 1982) (3-2 decision).

<sup>113</sup>The seven specified crimes are arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery. IND. CODE § 35-42-1-1(2) (1982).

<sup>114</sup>*See, e.g., id.* § 35-43-2-1 (burglary becomes a Class A felony if it results in bodily injury or serious bodily injury to any person other than a defendant).

<sup>115</sup>*Id.* § 35-42-1-1.

<sup>116</sup>*Id.* § 35-41-5-1.

tions the court gave a correct instruction on attempted murder, which included the element of specific intent. Thus, the jury was given two inconsistent and contradictory theories regarding an essential element of the crime of attempted murder.

### B. Arrest, Search and Seizure

1. *Statutory Developments.*—One of the more controversial amendments to the criminal procedure code<sup>117</sup> enacted during the survey period was a “knock and announce” law. This provision became a media event in Indianapolis and received only a narrow vote of approval in the Indiana House of Representatives. The amendment simply stated that a law enforcement officer executing an arrest warrant<sup>118</sup> or search warrant<sup>119</sup> may break open an outer or inner door or window if he is not admitted following an announcement of his authority and purpose. What is amazing about the controversy over this “new” law is that a similar law had been in existence in Indiana since 1905<sup>120</sup> and was well-accepted in case law.<sup>121</sup>

Several other changes in arrest and search laws were made by the Indiana General Assembly in 1983. As noted in last year’s survey article,<sup>122</sup> some confusion existed over the proper procedures for effecting an arrest for an infraction or ordinance violation, due to the existence of two separate statutes on the same subject. This has been remedied by the repeal of a provision in the criminal procedure code.<sup>123</sup> The arrest provisions for infractions and ordinances are now found solely in Indiana Code section 34-4-32-3.<sup>124</sup> Another amendment permits a search warrant issued by a court not of record to be executed only in the court’s county.<sup>125</sup>

<sup>117</sup>For a discussion of the most recently enacted Indiana criminal procedure code, most of which became effective on September 1, 1982, see Johnson, *Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 119-47 (1983).

<sup>118</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 4, 1983 Ind. Acts 1943, 1944-45 (codified at IND. CODE § 35-33-2-3(b) (Supp. 1983)).

<sup>119</sup>Act of Apr. 18, 1983, Pub. L. No. 20-1983, § 7(d), 1983 Ind. Acts 1943, 1949 (codified at IND. CODE § 35-33-5-7(d) (Supp. 1983)).

<sup>120</sup>Act of Mar. 10, 1905, ch. 169, § 132, 1905 Ind. Acts 584, 614 (formerly codified at IND. CODE § 35-1-19-6 (1982) (repealed 1983)).

<sup>121</sup>See *Cannon v. State*, 414 N.E.2d 578 (Ind. Ct. App. 1980); *Johnson v. State*, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

<sup>122</sup>Johnson, *supra* note 117, at 124-25.

<sup>123</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 2, 1983 Ind. Acts. 1943, 1944 (repealing IND. CODE § 35-33-1-1(5) (1982)).

<sup>124</sup>This section provides:

A person who knowingly or intentionally refuses to provide either his:

(1) name, address, and date of birth; or

(2) driver’s license, if in his possession;

to a law enforcement officer who has stopped the person for a [sic] infraction or ordinance violation commits a Class C misdemeanor.

IND. CODE § 34-4-32-3 (1982).

<sup>125</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 7, 1983 Ind. Acts 1943, 1949 (codified at IND. CODE § 35-33-5-7(a) (Supp. 1983)).

Another controversial piece of legislation enacted by the legislature was the law creating a “good faith” exception to the exclusionary rule.<sup>126</sup> Last year, in *Illinois v. Gates*,<sup>127</sup> the United States Supreme Court avoided the issue of a good faith exception;<sup>128</sup> however, the Court has recently granted certiorari in two other cases involving this issue.<sup>129</sup> An analysis of the constitutionality of the Indiana statute would be more informed by awaiting these decisions. It should be emphasized, however, that Indiana’s good faith statute applies only where a search warrant has been obtained, or where the evidence is obtained by reliance on “a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated.”<sup>130</sup>

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<sup>126</sup>Act of Apr. 5, 1983, Pub. L. No. 323-1983, 1983 Ind. Acts 1968 (codified at IND. CODE § 35-37-4-5 (Supp. 1983)). This statute provides:

(a) In a prosecution for a crime or a proceeding to enforce an ordinance or a statute defining an infraction, the court may not grant a motion to exclude evidence on the grounds that the search or seizure by which the evidence was obtained was unlawful if the evidence was obtained by a law enforcement officer in good faith.

(b) For purposes of this section, evidence is obtained by a law enforcement officer in good faith if:

(1) it is obtained pursuant to:

(A) a search warrant that was properly issued upon a determination of probable cause by a neutral and detached magistrate, that is free from obvious defects other than nondeliberate errors made in its preparation, and that was reasonably believed by the law enforcement officer to be valid; or

(B) a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated; and

(2) the law enforcement officer, at the time he obtains the evidence, has satisfied applicable minimum basic training requirements established by rules adopted by the law enforcement training board under IC 5-2-1-9.

(c) This section does not affect the right of a person to bring a civil action against a law enforcement officer or a governmental entity to recover damages for the violation of his rights by an unlawful search and seizure.

IND. CODE § 35-37-4-5 (Supp. 1983).

<sup>127</sup>103 S. Ct. 2317 (1983).

<sup>128</sup>In *Illinois v. Gates*, the Supreme Court asked the parties to brief and argue the question of whether the exclusionary rule “should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.” The Court ultimately decided not to address this issue because it was not presented to the Illinois state courts. 103 S. Ct. 2321.

<sup>129</sup>*Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom. Massachusetts v. Sheppard*, 103 S. Ct. 3534 (1983); *United States v. Leon*, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983).

<sup>130</sup>IND. CODE § 35-37-4-5(b)(1)(B) (Supp. 1983). The Seventh Circuit Court of Appeals also recently sidestepped a good faith argument in *United States v. Pichany*, 687 F.2d 204 (7th Cir. 1982), where that argument was not asserted by the government in the lower court, but rather by the district court sua sponte in its opinion. The Seventh Circuit did comment: “The good faith exception, where it has been explicitly recognized, provides that evidence is not to be suppressed under the exclusionary rule where that evidence was discovered by

2. *Community Caretaking Exception to Warrant Requirement.*—In *United States v. Pichany*,<sup>131</sup> the Seventh Circuit Court of Appeals refused to extend the community caretaking exception to the fourth amendment warrant requirement to a warehouse. The facts of this case indicated that the owner of a trailer manufacturing company, Hunter, reported a burglary at his business. The burglary was not in progress when Hunter made the report, and the police agreed to meet Hunter at the premises within an hour. The site of the burglary contained approximately sixty aluminum buildings of nearly equal size and appearance. No signs designated the occupants of separate buildings. The defendant, Pichany, leased a building located near Hunter's buildings. When the police arrived, they attempted to locate Hunter at his buildings and then went to the defendant's building. After knocking and calling for Hunter, the police entered the unlocked building, which contained a semi-tractor and trailer. The truck was amateurishly painted and the officers became suspicious and investigated further, recording the license number of the truck. The officers also found two new farm tractors in the defendant's building and recorded their serial numbers. Later, the officers discovered that the semi-tractor and the farm tractors were stolen, but unrelated to the Hunter burglary. They obtained a search warrant and seized the vehicles.

The defendant was subsequently charged with the theft of four tractors. The defendant moved to suppress the evidence found in his warehouse on the ground that the officers' warrantless entry into his building violated the fourth amendment.<sup>132</sup> In response, the government argued that when the officers made the warrantless entry into the unlocked warehouse, they were conducting a "community caretaking function" under *Cady v. Combrowski*.<sup>133</sup> In *Cady*, a car driven by an intoxicated off-duty police officer was disabled in an accident. Because the car was a hazard to traffic on the road, the police towed the car to a garage. The police believed that the off-duty officer's gun might be in his car and searched the car. No warrant was obtained because no crime was being investigated. The search revealed bloody clothing that was instrumental in the defendant's subsequent conviction for murder. The United States Supreme Court found that the search did not violate the fourth amendment because it was performed within the police "community caretaking function" and was therefore reasonable.<sup>134</sup>

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the officers acting in good faith and in a reasonable, though mistaken, belief that they were authorized to take those actions." *Id.* at 209 (citing *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981)).

<sup>131</sup>687 F.2d 204 (7th Cir. 1982). This case is also discussed in Been & Donnell, *Constitutional Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 79, 92 (1984).

<sup>132</sup>*Id.* at 206. The district court granted the motion and the government appealed. *Id.*

<sup>133</sup>413 U.S. 433 (1973).

<sup>134</sup>*Id.* at 447-48.

The *Pichany* court rejected the government's community caretaking argument, noting that, unlike the impounded car in *Cady*, the police in *Pichany* exercised no dominion or control over the warehouse. Second, unlike *Cady*, the officers in the present case "were under no obligation to secure the warehouse or to preserve its contents where no threat of damage or theft was immediately present."<sup>135</sup> Also, in contrast to *Cady*, the facts of *Pichany* did not indicate any danger to the public. Most importantly, this case did not involve a vehicle. The Seventh Circuit stated that, in *Cady*, the Supreme Court expressly limited the community caretaking exception to automobiles.<sup>136</sup>

3. *Vehicle Searches*.—Recent developments in vehicle search rules were highlighted by two recent Indiana decisions. In *Fyock v. State*,<sup>137</sup> the Indiana Supreme Court reversed a third district court of appeals decision.<sup>138</sup> In this case, an off-duty police officer saw a suspect remove an object from the gas tank of a parked car. The suspect carried this object, described as a "sock type thing,"<sup>139</sup> to the driver's window of the car where the defendant Fyock was sitting. As the officer approached the car, he saw three other people in the car passing a cigarette and noticed the odor of marijuana.<sup>140</sup> The officer grabbed the suspect standing outside the car and informed him and Fyock that they were under arrest. The officer then saw what seemed to be a package of marijuana on the front seat next to Fyock. After the officer identified himself, Fyock started the car's engine and the suspect standing outside the car together with the three passengers fled on foot. When Fyock began to move the car, the officer drew his gun and ordered him to stop. The officer pulled Fyock from the car and patted him down, but he found no weapons or drugs. When other officers arrived, one of them looked into the car and saw two sweat socks in the back seat on the floor. One of the socks clearly had something in the toe, but the officer could not see what was inside.<sup>141</sup> The officer investigated the sock and found tablets of methaqualone, the basis for the charge against Fyock.

The court of appeals concluded that the search of the sock was unlawful and reversed the defendant's conviction.<sup>142</sup> The court of appeals

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<sup>135</sup>687 F.2d at 207.

<sup>136</sup>*Id.* at 209.

<sup>137</sup>436 N.E.2d 1089 (Ind. 1982). For a further discussion of this case, see Been & Donnelly, *Constitutional Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 79, 87 (1984).

<sup>138</sup>428 N.E.2d 58 (Ind. Ct. App. 1981) *rev'd*, 436 N.E.2d 1089 (Ind. 1982).

<sup>139</sup>436 N.E.2d at 1092.

<sup>140</sup>For a recent Seventh Circuit case discussing odor of drugs as furnishing probable cause, see *United States v. Sweeney*, 688 F.2d 1131 (7th Cir. 1982); see also Annot., 5 A.L.R.4th 681 (1981).

<sup>141</sup>428 N.E.2d at 61.

<sup>142</sup>*Id.* at 64. The court of appeals found that the search was not valid as a search incident to a lawful arrest because the sock was "well out of Fyock's area of control." *Id.*

stated that under the United States Supreme Court decision of *New York v. Belton*,<sup>143</sup> the search of the sock would probably be considered valid as a search incident to a lawful arrest. However, the court of appeals concluded that *Belton* established a new constitutional principle and refused to apply it retroactively to the *Fyock* case, where the search had occurred one year before the *Belton* decision.

The Indiana Supreme Court unanimously reversed the court of appeals. The supreme court did not view *Belton* as enunciating a new constitutional principle, and therefore held that there was no issue of retroactive application in the *Fyock* case.<sup>144</sup> The court also said that, given the facts in this case, there was probable cause to believe that the sock contained contraband.<sup>145</sup> The court found that "where there is probable cause to believe an automobile contains the fruits or instrumentalities of a crime, the inherent mobility of the automobile combines to justify a warrantless search."<sup>146</sup>

The defendant in *Fyock* also attempted to argue that the sock could not have been searched under *United States v. Chadwick*.<sup>147</sup> The Indiana Supreme Court answered this argument by holding that the defendant could not have had a substantial expectation of privacy with regard to the sock. While as a matter of common sense this is no doubt accurate, as a matter of constitutional law it is incorrect. As confusing as recent

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<sup>143</sup>453 U.S. 454 (1981).

<sup>144</sup>"A careful reading of that case shows the United States Supreme Court considered the decision as one that elaborated on the validity of searches incident to lawful custodial arrests, when the arrestee was the recent occupant of an automobile." 436 N.E.2d at 1091.

<sup>145</sup>On this point the *Fyock* case seems very similar to the recent United States Supreme Court "plain view" case of *Texas v. Brown*, 103 S. Ct. 1535 (1983). In *Brown* a police officer stopped the defendant's car at a routine driver's license checkpoint and asked him for his license. He shined his flashlight into the car and saw an opaque, green party balloon, knotted at the tip, fall from Brown's hand to the seat next to him. While the defendant was fumbling in the glove compartment for his license, the officer shifted his view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. When the defendant could not produce a license, he was asked to get out of his car. When he did, the officer seized the balloon. Brown was placed under arrest. An on-the-scene inventory of the car revealed several plastic bags containing a green leafy substance and a large bottle of milk sugar. Later tests indicated that heroin was in the party balloon. The majority opinion of the Supreme Court held that the plain view doctrine justified seizure of the balloon where the officer was in a place where he had a right to be when he observed the balloon and had probable cause to believe what was in it.

While the officers in *Fyock* could no more see into the sock than could the officer in *Brown* see into the balloon, surely the probable cause was as strong as in *Brown*. The officer in *Fyock* observed some unusual activity, something that looked like a sock being passed into the car, passing of a cigarette among three passengers combined with the odor of marijuana, the flight of the other suspects, and the attempted flight of *Fyock*.

<sup>146</sup>436 N.E.2d at 1094.

<sup>147</sup>433 U.S. 1 (1977) (holding that the warrantless search of a footlocker found in a car was unreasonable, and distinguishing the requirements for the valid search of a car from those for a footlocker because a person has a greater expectation of privacy with regard to a footlocker).

United States Supreme Court vehicle search cases have been, the Court is in virtually unanimous agreement that no constitutionally worthy or unworthy containers are found in vehicles.<sup>148</sup> Having ruled that the search in *Fyock* was proper either as a search incident to arrest based upon *Belton*, or as a search based upon probable cause, it was unnecessary to rule on the *Chadwick* argument. If an item is legally seized under one theory, it matters not that it was illegally seized under another.

An Indiana case which appears similar in many respects to *Fyock*, but involves a slightly different principle of constitutional search and seizure law, is *Klopfenstein v. State*.<sup>149</sup> In this decision an officer made a lawful stop of a vehicle and a lawful arrest of the defendant, the driver of the car. He searched the defendant's person and found a clear plastic bag which contained a closed Tylenol pill bottle and some loose pills. The officer opened the Tylenol bottle and saw a greenish-brown substance which was later analyzed and identified as hashish.

The second district court of appeals chose not to rely directly on the *Belton* decision in ruling that the search of the Tylenol bottle was a proper search incident to arrest.<sup>150</sup> Instead, the court held that *United States v. Robinson*<sup>151</sup> justified the search of the bottle. In *Robinson*, the United States Supreme Court upheld a search of a crumpled cigarette package found on the defendant's person as a search incident to arrest.<sup>152</sup> The court also distinguished *United States v. Chadwick*<sup>153</sup> and its progeny on the ground that "*Chadwick* does not protect from warrantless searches items which are found on the person of an arrestee or items immediately associated with his person."<sup>154</sup>

4. *Probable Cause*.—It will be interesting to see the effect of *Illinois v. Gates*<sup>155</sup> on the issue of probable cause for arrest or search. In *Gates*, the Supreme Court held that the *Aguilar-Spinelli*<sup>156</sup> two-pronged test for determining whether an informant's tip establishes probable cause for the issuance of a search warrant should be abandoned in favor of a totality of the circumstances approach. Indiana has a statute which is the general equivalent of the *Aguilar-Spinelli* two-prong test for probable cause.<sup>157</sup>

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<sup>148</sup>*United States v. Ross*, 456 U.S. 798, 822 (1982).

<sup>149</sup>439 N.E.2d 1181 (Ind. Ct. App. 1982).

<sup>150</sup>The decision not to rely on *Belton* was correct because *Belton* concerned a search of the interior of a vehicle incident to arrest, not a search of a person incident to arrest.

<sup>151</sup>414 U.S. 218 (1973).

<sup>152</sup>*Id.* at 235.

<sup>153</sup>433 U.S. 1 (1977).

<sup>154</sup>439 N.E.2d at 1188 (quoting *Chambers v. State*, 422 N.E.2d 1198, 1203 (Ind. 1981)).

<sup>155</sup>103 S. Ct. 2317 (1982).

<sup>156</sup>*Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). See generally Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974).

<sup>157</sup>IND. CODE § 35-33-5-2(a) (1982) provides: "When based on hearsay, the affidavit shall contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished."



However, this statute is not necessarily inconsistent with the *Gates* totality of the circumstances approach because it does not limit or pigeonhole the methods of proving credibility and factual basis.

Two recent Indiana decisions regarding issues of probable cause will remain significant even after the *Gates* decision. In *Nash v. State*,<sup>158</sup> the second district court of appeals firmly established that "declarations against penal interest constitute an indicia of credibility which may be utilized in ascertaining the credibility of an informant whose information provides the basis of an affidavit for search warrant."<sup>159</sup> This is an important principle under either the two-prong or totality of the circumstances approach.

The second case is *Flaherty v. State*,<sup>160</sup> a "controlled buy" case. In the typical controlled buy case the police use an informant to make a drug purchase. They may strip search the informant to insure that he has no drugs on his person, give him money, send him into the place where the buy is to be made, observing him all the time, and search the informant again when he returns with the drugs. These facts and the officers' observations of the informant as he enters the place of purchase are set forth in a probable cause affidavit and a search warrant is obtained to search the place where the purchase was made. Under this set of facts it does not matter how credible the informant is. Probable cause is not based on hearsay because the informant is not telling the police officers something which they then put in a warrant. It is based upon the personal observations of the officers. Indiana courts have approved searches under this type of factual situation.<sup>161</sup>

The distinguishing feature in *Flaherty* was that the probable cause affidavit for the search warrant indicated only that the affiant police officer observed the informant making the buy enter an apartment building, not the individual apartment of the defendant. The search warrant was directed to a search of the defendant's apartment within the building. Because the affiant officer was relying solely on his personal observations of the informant's actions, and the affidavit indicated he did not observe the informant enter the specific apartment he sought to search, the affidavit did not demonstrate sufficient probable cause to issue a warrant to search that particular apartment. This decision will not be altered by *Gates* because it does not concern probable cause based on hearsay, but rather concerns the sufficiency of probable cause based on personal observation.

5. *Arrest*.—The 1981 procedure code did not attempt to define "arrest." That task has been left to the courts and several Indiana deci-

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<sup>158</sup>433 N.E.2d 807 (Ind. Ct. App. 1982).

<sup>159</sup>*Id.* at 810.

<sup>160</sup>443 N.E.2d 340 (Ind. Ct. App. 1982).

<sup>161</sup>*Haynes v. State*, 431 N.E.2d 83 (Ind. 1982); *Watt v. State*, 412 N.E.2d 90 (Ind. Ct. App. 1980); *Whirley v. State*, 408 N.E.2d 629 (Ind. Ct. App. 1980); *Mills v. State*, 177 Ind. App. 432, 379 N.E.2d 1023 (1978).

sions addressed that issue in 1982. As the decisions indicate, this question usually arises when a confession is obtained from the defendant and he attempts to have it suppressed as the fruit of an illegal arrest. In *Triplett v. State*,<sup>162</sup> the police received a tip from a first time informant that he knew two men who claimed to have committed a robbery four days earlier. The police concluded that they had insufficient evidence to secure an arrest warrant but nevertheless wished to question the suspect, Triplett. Several officers went to Triplett's residence and were informed that the suspect was not home, so one of the officers left to obtain a search warrant. Triplett left his residence a short time later and was approached by three uniformed officers on his front lawn. The officer in charge asked Triplett for identification and then told him, without any explanation, to go to police headquarters for questioning. The defendant was searched and placed in the security cage of a squad car. He was not advised that he had no obligation to go with the police or that he could leave. At police headquarters Triplett was taken to an interrogation room and read his *Miranda* rights. The defendant was never advised that he was not formally charged or that he could leave, and a guard watched him for several hours. The defendant subsequently gave a confession that was admitted over his objection at trial and was convicted.

The Indiana Supreme Court reversed the defendant's conviction, relying on a United States Supreme Court decision which found that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests."<sup>163</sup> The Indiana court also quoted another decision in which the Supreme Court stated that " 'a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would believe that he was not free to leave.' "<sup>164</sup> The Indiana Supreme Court concluded that a reasonable person in Triplett's situation would believe that he was under arrest, and refused to permit the State to use the product of an illegal detention.

The Indiana Supreme Court confronted the same issue in *Dunaway v. State*.<sup>165</sup> In *Dunaway*, the defendant was a suspect in a murder case. The police went to Dunaway's home the day after the murder and requested that he come to the station for questioning. The police did not draw their guns or handcuff the defendant, and the defendant rode to the police station in the front seat of the police car. At the station, the defendant talked with an officer, whom he had known for several years, and was read his *Miranda* rights before any questions were asked. The

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<sup>162</sup>437 N.E.2d 468 (Ind. 1982).

<sup>163</sup>*Dunaway v. New York*, 442 U.S. 200, 216 (1979), quoted in *Triplett*, 437 N.E.2d at 469.

<sup>164</sup>437 N.E.2d at 469 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

<sup>165</sup>440 N.E.2d 682 (Ind. 1982).

defendant had previous encounters with the police and stated that he understood his rights. After giving a statement the defendant asked to see his girlfriend "before he was arrested."<sup>166</sup> Like the defendant in *Triplett*, Dunaway was not specifically informed that he was not under arrest or that he was free to leave. However, the supreme court concluded that the facts of this case supported the trial court's conclusion that the defendant did not think he was under arrest when he was taken to the police station. Clearly then, whether someone has been "arrested" or "seized" within the meaning of the fourth amendment is an extremely fact sensitive determination.<sup>167</sup>

In one other arrest case, the Indiana Supreme Court ruled in *Brown v. State*<sup>168</sup> that a misdemeanor arrest may be based upon the collective information known to the law enforcement agency, even if the arresting officer does not personally possess probable cause to arrest. This has been the rule in felony cases for several years.<sup>169</sup> However, a well-established rule in misdemeanor cases is that the arresting officer must personally observe the commission of the misdemeanor.<sup>170</sup> In the *Brown* case a police officer did observe the commission of a misdemeanor in his presence, but he relayed this information to another officer, who did not personally observe it, and the second officer made the arrest. The arrest was upheld by the court.<sup>171</sup>

### C. Confessions

1. *Emergency Exception to Miranda*.—Perhaps the most significant confession case decided during the survey period was *Cronk v. State*,<sup>172</sup> in which the Indiana Court of Appeals adopted an "emergency exception" to the *Miranda* requirements.<sup>173</sup> In *Cronk*, the defendant had chained himself, in protest, to a cannon on a courthouse lawn. He had a piece of plywood and a sleeping bag in close proximity to the cannon. When Cronk refused to unlock his chain and continue his protest on the sidewalk, police officers cut the chain, handcuffed him, and placed him in custody. On the way to the police car Cronk turned back toward the cannon yelling that if the officer who was standing on the plywood stepped off he would be blown up because there was a bomb under the board. The police took Cronk back to the cannon and inquired about the bomb. Cronk

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<sup>166</sup>*Id.* at 685.

<sup>167</sup>See also *Minneman v. State*, 441 N.E.2d 673 (Ind. 1982).

<sup>168</sup>442 N.E.2d 1109 (Ind. 1982).

<sup>169</sup>See, e.g., *Owens v. State*, 427 N.E.2d 880 (Ind. 1981); *Benton v. State*, 401 N.E.2d 697 (Ind. 1980).

<sup>170</sup>*Hart v. State*, 195 Ind. 384, 145 N.E.2d 492 (1924); IND. CODE § 35-33-1-1(4) (Supp. 1983).

<sup>171</sup>The *Brown* decision also discusses the issue of "pretext" arrests. 442 N.E.2d at 1115.

<sup>172</sup>443 N.E.2d 882 (Ind. Ct. App. 1983).

<sup>173</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

said the officer could safely step off the board because the bomb would not explode unless a string was pulled. When the plywood was removed, a string was observed extending from a mound of dirt. Cronk indicated this as the bomb's location. Cronk was further questioned about the bomb at the jail and he drew a diagram which was turned over to State Police officers. The state troopers dismantled the bomb and then went to the jail to question the defendant. Then, for the first time, Cronk was advised of his *Miranda* rights. It was undisputed that he was not advised before he drew the diagram or before he made his statements at the scene.

The court of appeals broke down the incriminating evidence given by the defendant into three separate categories. First, the defendant's statement that if the officer stepped off the board a bomb would explode was admissible, despite the absence of *Miranda* warnings, because it was not elicited through custodial interrogation, but rather was a spontaneous voluntary statement outside the scope of *Miranda*.<sup>174</sup>

Second, when the defendant was returned to the location of the bomb and asked questions about it, he was certainly in custody and was clearly being interrogated. As such, *Miranda* would ordinarily apply. However, the court of appeals stated that the questioning was not designed to elicit incriminating information, but was instead designed to deal with an emergency situation. Therefore, it could be argued that such questioning was not "interrogation" within the meaning of *Miranda*. However, the court felt that other reasons existed supporting the officers' actions in this case:

The officers found themselves presented with an emergency situation possibly life-threatening or likely to cause personal injuries or serious property damage. They had been informed of the presence of a bomb. They were themselves possibly within a danger zone of grave consequences, as were Cronk and any other persons who came upon the scene. At this point, they did not know of the size of the bomb, its manner of detonation, or probable impact. They returned Cronk to the scene and obtained from him pertinent information concerning the location and method of detonation of the bomb. We believe they had a right, even a duty, to make such inquiry of Cronk and that they did not have to risk possible death or serious bodily injury while they read Cronk his *Miranda* rights or waited for Cronk's lawyer to arrive from another city. Under the circumstances of this case, we believe the *Miranda* rule must yield to the emergency.<sup>175</sup>

The court therefore held that an emergency exception to the *Miranda* requirements exists where safety of the public, the officers, or the accused

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<sup>174</sup>443 N.E.2d at 884.

<sup>175</sup>*Id.* at 885 (footnote omitted).

is threatened and time is critical to ensure safety.<sup>176</sup> Regarding the diagram drawn at the jail, the court of appeals concluded that the trial court properly excluded this evidence because the emergency had passed and *Miranda* warnings had not yet been given.

In adopting the emergency exception to the *Miranda* requirements, the court of appeals relied on several cases from other jurisdictions<sup>177</sup> and the "emergency exception" to the search warrant requirement.<sup>178</sup> The emergency doctrine has been limited in at least one jurisdiction. In *People v. Quarles*,<sup>179</sup> the New York Court of Appeals rejected an emergency exception to the *Miranda* rule under the facts present in that case.<sup>180</sup> The United States Supreme Court may resolve this issue, as the Court has granted certiorari to review the *Quarles* case.<sup>181</sup>

2. *Confessions and the Right to Counsel*.—An area of confusion in the law of confessions was reflected in the decisions of the Indiana Supreme Court this past year concerning the continued interrogation of a defendant once he has in some manner invoked the right to counsel. In *Wall v. State*,<sup>182</sup> the court had little difficulty reversing a conviction when the defendant expressly invoked his right to an attorney five times during the course of a confession which was later introduced at trial.

The issue was not so simple, however, in *Bryan v. State*.<sup>183</sup> In this case, the defendant had been properly advised of his *Miranda* rights. During his interrogation the defendant indicated that he wanted an attorney present, but it was unclear whether he was requesting one during questioning or for trial. When the defendant seemed to indicate that he wanted an attorney during questioning, the tape recorder was shut off for several minutes. During this silent interval the two interrogating police officers apparently just sat there and said nothing. When the defendant asked the officers why they had stopped, the police told him that since

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<sup>176</sup>*Id.* at 887.

<sup>177</sup>*Id.* at 886 (citing *United States v. Castellana*, 500 F.2d 325 (5th Cir. 1974); *Commonwealth v. Hankins*, 293 Pa. Super. 341, 439 A.2d 142 (1981)).

<sup>178</sup>443 N.E.2d at 885 (citing *Mincey v. Arizona*, 437 U.S. 385 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, *cert. denied*, 429 U.S. 988 (1978); *Maxey v. State*, 251 Ind. 645, 244 N.E.2d 650 (1969), *cert. denied*, 397 U.S. 949 (1970)).

<sup>179</sup>58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *cert. granted sub nom.* *New York v. Quarles*, 103 S. Ct. 2118 (1983).

<sup>180</sup>After the defendant had been frisked and handcuffed police officers discovered an empty shoulder holster and asked where the gun was. The defendant pointed and said, "The gun is over there." 58 N.Y.2d at 664, 444 N.E.2d at 985, 458 N.Y.S.2d at 521. *But cf.* *People v. Chesnut*, 51 N.Y.2d 14, 409 N.E.2d 958, 431 N.Y.S.2d 485 (1980) (stop and frisk was justified by reasonable suspicion, and single question by officer about location of gun was justified to protect officer's safety and did not constitute custodial interrogation).

<sup>181</sup>*New York v. Quarles*, 103 S. Ct. 2118 (1983).

<sup>182</sup>441 N.E.2d 682 (Ind. 1982).

<sup>183</sup>438 N.E.2d 709 (Ind. 1982).

he said he wanted an attorney they could not ask him any more questions. The defendant then stated that he wanted an attorney to defend him, but that he wanted to tell the police what happened. After the tape recorder was turned back on, the defendant still seemed somewhat confused, but did agree that he wanted to give a statement first, and then obtain an attorney. In ruling that the tape-recorded confession was admissible, a majority of the Indiana Supreme Court stated: "It appears that defendant exercised his free will and voluntarily and knowingly made the confession."<sup>184</sup>

Justice DeBruler authored a dissent joined by Justice Hunter.<sup>185</sup> The dissent began by commenting that the analysis employed by the majority was faulty because it mixed the separate issues of whether the confession was voluntary with the question of whether there was a valid waiver of the right to counsel, the latter requiring a higher standard of proof from the State. The dissent relied on the United States Supreme Court decision in *Edwards v. Arizona*,<sup>186</sup> and found that the State bore the burden of showing that the defendant waived his right to counsel when the tape recorder was turned back on. The State's burden was to show beyond a reasonable doubt that the defendant knowingly and intelligently waived his right to counsel. The dissent found that the defendant's confusion indicated that the State had not met this burden.

A two-step analysis is the appropriate way to analyze the *Bryan* case. This is clear from the split decision of the United States Supreme Court in *Oregon v. Bradshaw*,<sup>187</sup> which interpreted *Edwards v. Arizona*. The plurality opinion in *Bradshaw* held that when a suspect undergoing interrogation requests an attorney, and the police stop their interrogation and subsequently resume it at a later time without the presence of an attorney, two questions must be asked: first, whether the suspect "initiated" further conversation with the police, and second, if he did, whether, in light of the totality of the circumstances, he made a knowing and intelligent waiver of the right to counsel.<sup>188</sup>

In *Bradshaw*, the defendant's waiver of the right to counsel was not at issue, rather the split in the Supreme Court was over the definition of the term "initiate" for the purpose of an *Edwards* analysis. The plurality opinion in *Bradshaw* ruled that a defendant initiates a conversation with the police within the meaning of *Edwards* when he evinces "a willingness and a desire for a generalized discussion about the investigation,"<sup>189</sup> as opposed to a request for a cigarette or a drink of

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<sup>184</sup>*Id.* at 718.

<sup>185</sup>*Id.* at 719 (DeBruler, J., dissenting).

<sup>186</sup>451 U.S. 477 (1981).

<sup>187</sup>103 S. Ct. 2830 (1983) (plurality opinion).

<sup>188</sup>*Id.* at 2832. Justice Powell, concurring in the judgment of the plurality opinion, would not apply a two-step analysis. *Id.* at 2837-38 (Powell, J., concurring).

<sup>189</sup>*Id.* at 2835.

water. The dissent would have limited initiation to a communication by the defendant "about the subject matter of the criminal investigation."<sup>190</sup> In the *Bradshaw* case the defendant asked, "Well, what is going to happen to me now?"<sup>191</sup> This question, coming after he had requested an attorney and after questioning had stopped, was held to have initiated further conversation.

In summary, the majority's analysis in the *Bryan* case may have been incorrect, as the dissent claimed, because it did not separately examine whether the defendant made a valid waiver of the right to counsel. However, the conclusion is sound on the initiation issue. Bryan's inquiry as to why the police had halted their interrogation seems to be as much of an "initiation" as the defendant's question in *Bradshaw*.

In another case decided last year, Justice DeBruler again disagreed with a majority of the supreme court, this time on the adequacy of an advisement of the right to counsel during interrogation. In *Solomon v. State*,<sup>192</sup> the defendant was advised orally and in writing that he was "entitled to legal counsel present at all times,"<sup>193</sup> and was orally advised that he could use the telephone to contact an attorney if he wished. The majority found this advice sufficient to inform the defendant that he had a right to have an attorney present during interrogation. Justice DeBruler, however, felt that the advice on this point must be more explicit to satisfy the *Miranda* requirements.<sup>194</sup>

3. *Miranda Warnings in Non-traditional Settings*.—The necessity for *Miranda* warnings in a judicial hearing was explored in *State v. McClain*.<sup>195</sup> At the defendant's first judicial appearance, now called an initial appearance, the trial judge advised the defendant that he was charged with robbery and asked whether he was going to hire an attorney. The defendant responded: "The reason why I did the robberies, I needed money, so therefore I can't hire an attorney because I don't have any money."<sup>196</sup> The trial judge excluded this statement from the trial and the defendant was acquitted. On the State's appeal, the fourth district court of appeals held that the trial judge erred in excluding the statement. Although the court cautioned judges to warn defendants before they speak at judicial hearings, it stated that " 'interrogation occurs only when officials intend to elicit, by whatever means, substantive evidence concerning criminal activity.' "<sup>197</sup> Here, the judge "did not intend to elicit evidence or obtain a confession when he asked McClain if he was going to hire a lawyer."<sup>198</sup>

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<sup>190</sup>*Id.* at 2839 (Marshall, J., dissenting).

<sup>191</sup>*Id.* at 2833.

<sup>192</sup>439 N.E.2d 570 (Ind. 1982).

<sup>193</sup>*Id.* at 575.

<sup>194</sup>*Id.* at 579 (DeBruler, J., dissenting).

<sup>195</sup>442 N.E.2d 1131 (Ind. Ct. App. 1982).

<sup>196</sup>*Id.* at 1132.

<sup>197</sup>*Id.* at 1133 (quoting *Nading v. State*, 268 Ind. 634, 639, 377 N.E.2d 1345, 1348 (1978)).

<sup>198</sup>442 N.E.2d at 1134.

The court concluded that the statements McClain gave were voluntary and not the product of custodial interrogation. *Miranda* warnings were therefore not required and the statement should have been admitted.<sup>199</sup>

Two interesting, and apparently conflicting, decisions were handed down on the issue of whether a probation officer must give a probationer *Miranda* warnings. The fourth district court of appeals reviewed this question in detail in *Alspach v. State*,<sup>200</sup> where a probationer's statements to a probation officer were admitted at a probation revocation hearing. The court of appeals considered the issue to be whether a probation officer supervising a probationer is acting as a police officer or government agent for the purposes of giving *Miranda* warnings, because *Miranda* only applies to questioning by such individuals.<sup>201</sup> The court of appeals, however, acknowledged that because the right against self-incrimination is involved in this situation, caution should be used. Thus, the court adopted the following guidelines:

*Miranda* warnings need not be given by probation officers legitimately engaged in the supervision of probationers when

- a) the probationer is not in custody,
- b) the interrogation is reasonably related to the officer's duty to supervise the probationer, and,
- c) the questioning is reasonable under all the circumstances, including the length of time and hour of the day or night it is conducted, the manner in which it is conducted, the persons present during questioning, and the place where it is conducted.<sup>202</sup>

One of the underlying bases for the court of appeals' decision in *Alspach* was a finding that a probation officer supervising a probationer is an arm of the court, and not a government agent. More recently, however, the Indiana Supreme Court in *Rose v. State*<sup>203</sup> simply stated, without analysis, that the defendant was "correct that [the defendant's probation officer] was an agent of the State."<sup>204</sup> Thus, it could be contended that one of the foundational underpinnings of the *Alspach* decision was removed, and that the *Alspach* requirements are no longer good law. However, the supreme court in *Rose* went on to say that any statements made by a defendant to his probation officer "under any con-

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<sup>199</sup>See also *United States v. Dohm*, 618 F.2d 1169 (5th Cir. 1980) (defendant's statement at judicial hearing not admissible because judge's confusing statements misled defendant concerning whether his statements could be used against him).

<sup>200</sup>440 N.E.2d 502 (Ind. Ct. App. 1982).

<sup>201</sup>*Id.* at 503 (citing *Turner v. State*, 407 N.E.2d 235 (Ind. 1980); *Trinkle v. State*, 259 Ind. 114, 284 N.E.2d 816 (1972); *Leaver v. State*, 250 Ind. 523, 237 N.E.2d 368 (1968)).

<sup>202</sup>440 N.E.2d at 505.

<sup>203</sup>446 N.E.2d 598 (Ind. 1983).

<sup>204</sup>*Id.* at 600.



ditions akin to a custodial interrogation would require that they be preceded by the proper *Miranda* warnings and an acknowledgment that [he] was waiving his rights as described in those warnings.”<sup>205</sup> When the *Alspach* guidelines are closely examined it appears that they too would require *Miranda* warnings by probation officers before anything “akin to a custodial interrogation” takes place. On this point, *Alspach* and *Rose* can be reconciled.

4. *Juvenile Confessions*.—Several cases in the past year also discussed the special rules applicable to a juvenile’s waiver of rights, particularly the “meaningful consultation” and “no adverse interest” requirements.<sup>206</sup> In *Andrews v. State*,<sup>207</sup> a juvenile suspect was arrested, taken to the police station, and advised that he had the right to confer with a parent or guardian before the police could question him. The defendant stated that he wanted to talk to his grandmother, and that he did not want to talk to his parents. The police complied with his request. After a juvenile detention hearing, the defendant was taken back to the police station where he refused to speak to his mother, who was then at the station. The police advised the defendant and his grandmother of his rights, both signed a waiver form, and the defendant gave a statement.

The trial court did not grant defendant’s motion to suppress the statement and on appeal the defendant challenged the admission of his statement on the ground that he was not allowed to confer with his parents. Citing the leading case on juvenile confessions, *Lewis v. State*,<sup>208</sup> the court stated the special requirements for a juvenile’s waiver of rights are designed to give a juvenile the special status he enjoys in other areas of the law and to insure that a juvenile has a meaningful opportunity to consult with his parents or guardians, without police coercion, before he gives a statement. The court found the grandmother in this case to be a de facto guardian, and stated:

The main concern of *Lewis* and its progeny is to afford the

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<sup>205</sup>*Id.*

<sup>206</sup>IND. CODE § 31-6-7-3 (1982) provides, in pertinent part:

(a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:

(1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or

(2) by the child’s custodial parent, guardian, custodian, or guardian ad litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.

(b) The child may waive his right to meaningful consultation under subdivision (a)(2)(C) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

<sup>207</sup>441 N.E.2d 194 (Ind. 1982).

<sup>208</sup>259 Ind. 431, 288 N.E.2d 138 (1972).

juvenile defendant a stabilizing and relaxed atmosphere in which to make a serious decision that could possibly affect the rest of his life. The primary focus should be on the defendant's rights, not that of the parents. The record indicates that Defendant trusted his grandmother more than his parents. A trusting atmosphere, rather than an atmosphere riddled with animosity, would be more conducive to a meaningful consultation between a juvenile and an adult.<sup>209</sup>

The *Lewis* case involved a juvenile confession that was taken before the enactment of the present juvenile code, so no reference to the code was made by the court. However, the Indiana Supreme Court correctly interpreted the waiver of rights section of the juvenile code<sup>210</sup> in the *Andrews* case, because this section was primarily intended to codify the *Lewis* requirements.<sup>211</sup> The central issue is whom the juvenile trusts, and if a juvenile trusts another close relative, or de facto guardian, more than his own parents, then it is with that person that he can most likely have a meaningful consultation.<sup>212</sup>

There is, however, one important exception to this "trusted person" rule. The trusted person must not have an interest adverse to that of the juvenile. This was emphasized in *Taylor v. State*,<sup>213</sup> a recent decision by the Indiana Supreme Court. The defendant in *Taylor* was given an opportunity to consult with his mother prior to waiving his rights and giving a statement that was subsequently admitted into evidence at his trial. The defendant had been living with his uncle for at least a year prior to his arrest, although his mother saw him two or three times a month.<sup>214</sup> The defendant contended that he viewed his relationship with his mother with hostility and therefore should have been permitted to speak with someone else. However, the uncle, with whom the defendant had been living, was also arrested and charged with the same crime as the defendant. Therefore, the uncle would have had a potentially adverse interest to the juvenile and would not be a proper person to consult.<sup>215</sup> Under these facts the State took adequate care to ensure that the juvenile "had the opportunity for meaningful consultation with a person who had no 'interest' adverse to him"<sup>216</sup> by allowing him to talk with his mother.

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<sup>209</sup>441 N.E.2d at 198.

<sup>210</sup>IND. CODE § 31-6-7-3 (1982); see *supra* note 206.

<sup>211</sup>IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

<sup>212</sup>See Johnson, *supra* note 117, at 155-58.

<sup>213</sup>438 N.E.2d 275 (Ind. 1982).

<sup>214</sup>The defendant had not lived with his father for an even longer period of time. *Id.* at 284.

<sup>215</sup>See also *Borum v. State*, 434 N.E.2d 581 (Ind. Ct. App. 1982) (holding that minor's waiver of rights was invalid where it was joined by a welfare caseworker who signed the delinquency petition against the juvenile).

<sup>216</sup>438 N.E.2d at 284.

#### D. Miscellaneous Pre-Trial Issues

1. *Grand Jury*.—The court of appeals' decision in *Brown v. State*<sup>217</sup> may be significantly altered by a provision of the 1981 criminal procedure code that became effective September 1, 1982.<sup>218</sup> In *Brown* the defendant was indicted by a grand jury for involuntary manslaughter in a child abuse case. On appeal, the defendant claimed that his motion to dismiss the indictment should have been granted by the trial court because the investigating police officer was present during the grand jury proceedings. Although the prosecuting attorney actually conducted the examination of the witnesses, the officer actively intervened in the examination of nine witnesses, including the defendant and another suspect. The officer apparently stressed to the witnesses that they should "testify more fully and honestly"<sup>219</sup> and put pressure on the suspects to testify although their attorneys advised them to the contrary.

The court of appeals reversed the conviction because the "unauthorized presence and participation"<sup>220</sup> of the officer in the grand jury prejudiced the defendant's rights.<sup>221</sup> The new procedure code changed prior law by permitting "any witness the prosecuting attorney or the grand jury requests" to be present during the taking of testimony.<sup>222</sup> Therefore, an investigating officer's presence in the grand jury may now be authorized; however, an officer's conduct during grand jury proceedings may still be restricted by *Brown* because the decision was based on concepts of fairness as well as on the unauthorized presence of the officer.

The fact of Sergeant Mann's presence and the nature of his participation, though not pervading the entire hearing, was not only detrimental to a proper atmosphere and impartial consideration of the facts, but it also demonstrated oppression of witnesses. It is wholly unreasonable to infer that the totality of these circumstances did not influence the course of the proceedings in a manner adverse to Brown's substantial right to a detached and neutral atmosphere. To permit an indictment to stand because there was sufficient evidence supporting a finding of probable cause by the grand jury regardless of the manner in which the evidence was obtained and the manner in which the grand jury

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<sup>217</sup>434 N.E.2d 144 (Ind. Ct. App. 1982).

<sup>218</sup>Act of May 5, 1981, Pub. L. No. 298, § 3, 1981 Ind. Acts 2314 (codified at IND. CODE § 35-34-2-4(c) (1982)).

<sup>219</sup>434 N.E.2d at 145.

<sup>220</sup>*Id.*

<sup>221</sup>See *State v. Bowman*, 423 N.E.2d 605, 608 (Ind. 1981) (presence of police officers during grand jury proceedings is unauthorized and not proper however, "the presence of unauthorized persons during grand jury proceedings does not warrant *per se* the dismissal of an individual").

<sup>222</sup>IND. CODE § 35-34-2-4(c) (1982).

hearing was conducted vitiates the purpose of the prohibition against oppressive prosecution and the letter of the statute.<sup>223</sup>

2. *Change of Judge.*—During the survey period the Indiana General Assembly once again enacted legislation concerning the right to a change of judge. Before the enactment of the 1981 criminal procedure code, the right to a change of judge was governed primarily by Criminal Rule 12. As interpreted by the Indiana Supreme Court, this rule required that a timely application for a change of judge be granted despite the absence of a verified allegation of bias and prejudice and without a hearing on the application.<sup>224</sup> This was labeled the right to an “automatic” change of judge.

The 1981 procedure code adopted a new change of judge statute<sup>225</sup> that became effective June 1, 1981.<sup>226</sup> The new change of judge statute could be read in several different ways, but one interpretation would require verified allegations of cause in all motions for change of judge. This reading would eliminate the right to an automatic change of judge. The Indiana Supreme Court apparently believed the legislature intended this result, because the court amended the first paragraph of Criminal Rule 12, effective July 1, 1981, noting that it had done so after examining the new criminal procedure code.<sup>227</sup> The supreme court amendment eliminated the right to an automatic change of judge from Criminal Rule 12.

In 1982, the legislature added a preamble to the criminal procedure code which stated that the 1981 change of judge law was merely a restatement of prior law and should not be construed as having altered prior change of judge law.<sup>228</sup> The Indiana Supreme Court did not revise Criminal

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<sup>223</sup>434 N.E.2d at 146. In another case concerning grand jury proceedings, *In re Elkhart Grand Jury*, June 20, 1980, 433 N.E.2d 835 (Ind. Ct. App. 1982), the third district court of appeals reiterated the rule that grand juries do not have the authority “to issue reports criticizing . . . conduct . . . that does not constitute an indictable offense.” *Id.* at 838. This decision does not establish new law, but is notable for its partial reliance on sixty-year-old Indiana precedent. See *Coons v. State*, 191 Ind. 580, 134 N.E. 194 (1922).

<sup>224</sup>*State ex rel. Benjamin v. Criminal Court of Marion County*, 264 Ind. 191, 341 N.E.2d 395 (1976); accord *Briscoe v. State*, 180 Ind. App. 450, 388 N.E.2d 638 (1979).

<sup>225</sup>Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2376-77 (codified at IND. CODE §§ 35-36-5-1 to -2, (1982)).

<sup>226</sup>The majority of the procedure code became effective September 1, 1982. Act of May 5, 1981, Pub. L. No. 298, § 10(c), 1981 Ind. Acts 2314, 2392.

<sup>227</sup>The first paragraph of IND. R. CRIM. P. 12 now reads:

In any criminal action, a motion for change of judge or change of venue from the county shall be verified or accompanied by an affidavit signed by the Criminal Defendant or the Prosecuting Attorney setting forth facts in support of the statutory basis or bases for the change. An opposing party shall have the right to file counter-affidavits within ten [10] days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

<sup>228</sup>Act of Feb. 25, 1982, Pub. L. No. 204, 1982 Ind. Acts 1518.

Rule 12 in response to the new preamble; therefore, in 1983, the Indiana Legislature enacted the following provision: "In any criminal action, either the State or the defendant is entitled as a substantive right to a change of venue from the judge upon the same grounds and in the same manner as a change of venue from the judge is allowed in civil actions."<sup>229</sup> This apparently returns the right to an automatic change of judge to Indiana criminal law.<sup>230</sup> It should be noted that the legislature stated that this manner of obtaining a change of judge was a "substantive" right. The reason for characterizing the right in this manner is that supreme court rules control over legislative enactments in the area of "procedure,"<sup>231</sup> while statutes control over court rules in the area of "substantive" rights.<sup>232</sup> The Indiana Supreme Court has concluded that the right to a change of judge is a substantive right which can be conferred only by the legislature, but the method and time of asserting the right are matters of procedure which are controlled by court rule.<sup>233</sup>

3. *Summons, Initial Hearings, Omnibus Dates.*—Several new procedures in Indiana criminal law became effective in 1982, including initial hearings<sup>234</sup> and omnibus dates.<sup>235</sup> Certain aspects of these procedures were modified by 1983 legislation.<sup>236</sup> Under prior law the procedures for an initial hearing following issuance of a summons to appear were unclear.<sup>237</sup> The law provided that if an indictment or information is filed charging a person with a misdemeanor, the court could issue a summons in lieu of an arrest warrant, with the summons setting forth the offense and commanding the defendant to appear at a stated time and place.<sup>238</sup> The new law amends this to require that the court set the appearance date for the defendant at least seven days after the issuance of a summons.<sup>239</sup> The new law also requires that the court determine the existence of probable cause to believe a crime was committed before the court may issue an arrest warrant when a person does not appear in response to a summons.<sup>240</sup>

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<sup>229</sup>Act of Apr. 22, 1983, Pub. L. No. 311-1983, § 48, 1983 Ind. Acts 1861, 1922 (codified at IND. CODE § 35-36-6-1(a) (Supp. 1983)).

<sup>230</sup>See IND. R. TR. P. 76.

<sup>231</sup>State v. Bridenbager, 257 Ind. 699, 279 N.E.2d 794 (1972).

<sup>232</sup>State ex rel. Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

<sup>233</sup>*Id.*

<sup>234</sup>Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2314, 2320 (current version at IND. CODE § 35-34-4-1(a) (Supp. 1983) (effective Sept. 1, 1982)).

<sup>235</sup>Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2382 (current version at IND. CODE § 35-36-8-1 (Supp. 1983) (effective Sept. 1, 1982)).

<sup>236</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, 1983 Ind. Acts 1943.

<sup>237</sup>See Johnson, *supra* note 117, at 133.

<sup>238</sup>IND. CODE § 35-33-4-1(a) (1982) (amended 1983).

<sup>239</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 5, § 1(a), 1983 Ind. Acts 1943, 1945 (codified at IND. CODE § 35-33-4-1(a) (Supp. 1983)).

<sup>240</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 5, § 1(b), 1983 Ind. Acts 1943, 1945 (codified at IND. CODE § 35-33-4-1(b) (Supp. 1983)). See also, IND. CODE § 35-33-4-1(c) (Supp. 1983) (similar provision when court issues summons and "is satisfied that the person will not appear").

Another amendment provides that when a person is issued a summons, or a summons and a promise to appear, there need be no probable cause determination at the initial hearing "unless the prosecuting attorney requests on the record that the person be held in custody before his trial."<sup>241</sup> Thus, for many misdemeanor cases a probable cause determination at or before the initial hearing will no longer be required.

Another amendment to the initial hearing statute provides that the judge may advise the accused of his rights orally or in writing.<sup>242</sup> This same section, under the old law, required the judge to advise the accused at the initial hearing that a preliminary plea of not guilty would be entered for him, which would become a formal plea of not guilty within certain periods of time after the initial hearing unless the defendant "after consulting with counsel" entered a different plea.<sup>243</sup> This was amended in 1983 to strike the phrase "after consulting with counsel."<sup>244</sup> As previously written, a defendant apparently could not plead guilty at the initial hearing, even if he had unequivocally and knowingly waived his right to counsel and desired to plead guilty, unless he had first consulted an attorney.

One of the most confusing aspects of the new procedure code was the concept of omnibus dates.<sup>245</sup> Recent amendments have greatly simplified this area of the law. The omnibus date in felony cases will be set by the judicial officer at the initial hearing, and can be no earlier than forty-five days, and no later than seventy-five days after the completion of an initial hearing, unless the prosecutor and defendant agree upon another date.<sup>246</sup> A new provision also makes absolutely clear that the purpose of the omnibus date is to establish a date from which various other deadlines in the procedure code are set.<sup>247</sup> Finally, the amendments state that the omnibus date set at the initial hearing will, without exception, remain the omnibus date for the case until final disposition.<sup>248</sup> Thus, the omnibus date cannot be continued.

4. *Right to Counsel.*—In *Nation v. State*,<sup>249</sup> the second district court of appeals, in effect, applied guilty plea standards to determine whether

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<sup>241</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 9, 1983 Ind. Acts 1943, 1950 (codified at IND. CODE § 35-33-7-3.5. (Supp. 1983)).

<sup>242</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 10, 1983 Ind. Acts 1943, 1950-51 (codified at IND. CODE § 35-33-7-5 (Supp. 1983)).

<sup>243</sup>IND. CODE § 35-33-7-5 (1982) (amended 1983).

<sup>244</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 10, 1983 Ind. Acts 1943, 1951 (codified at IND. CODE § 35-33-7-5 (Supp. 1983)).

<sup>245</sup>IND. CODE § 35-36-8-1 (1982) (amended 1983); see Johnson, *supra* note 117, at 139.

<sup>246</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(a), 1983 Ind. Acts 1943, 1961 (codified at IND. CODE § 35-36-8-1(a) (Supp. 1983)).

<sup>247</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(b), 1983 Ind. Acts 1943, 1962 (codified at IND. CODE § 35-36-8-1(b) (Supp. 1983)).

<sup>248</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(d), 1983 Ind. Acts 1943, 1962 (codified at IND. CODE § 35-36-8-1(d) (Supp. 1983)).

<sup>249</sup>426 N.E.2d 436 (Ind. Ct. App. 1981), *reh'g denied*, 438 N.E.2d 1003 (Ind. Ct. App. 1982), *vacated*, 445 N.E.2d 565 (Ind. 1983).

a defendant had effectively waived his right to counsel and chosen to proceed to trial *pro se*. The court of appeals held that the record of the proceedings of a defendant who seeks to waive his right to counsel and proceed *pro se* must, on its face, include "direct evidence" that the defendant was clearly advised of the following: "1) of his right to counsel, 2) the exercise of his right to proceed *pro se* constitutes a waiver of that right, and 3) of the disadvantages of self-representation."<sup>250</sup> The record must also show that the defendant "clearly and unequivocally exercised his right to proceed *pro se*."<sup>251</sup>

The Indiana Supreme Court disagreed and vacated the court of appeals' decision.<sup>252</sup> The supreme court agreed that it is dangerous for a defendant to go to trial *pro se*; however, the supreme court refused to require that the advisements needed for a valid guilty plea be given to a defendant who is waiving the right to counsel. The court noted that guilty pleas are, in themselves, convictions, whereas the waiver of counsel and self-representation, no matter how ill-advised, is not the equivalent of a conviction. The defendant in *Nation* had retained counsel but became dissatisfied and fired his attorney on the morning of trial. The trial court advised the defendant of the dangers of self-representation and urged him to have representation. The defendant refused and the trial court permitted the defendant's attorney to withdraw, but ordered that he remain in a stand-by capacity. Because the defendant had the funds to hire an attorney, he was not entitled to appointed counsel. The trial court said they would then proceed to try the case and asked the defendant if that was his wish. The defendant replied that it was. Under these facts, the supreme court held that the trial court did not compel the defendant to proceed *pro se* and that the defendant knowingly and intelligently waived his right to counsel.<sup>253</sup>

An interesting challenge to local public defender systems was asserted in *Wright v. State*.<sup>254</sup> The defendant contended that the public defender selection system in Lake County violated the sixth amendment and the Code of Professional Responsibility by preventing public defenders from acting as independent advocates. Public defenders in Lake County were assigned to specific courtrooms and were alleged to be "hired by and serve at the pleasure and behest of the judges"<sup>255</sup> of the criminal division of the superior court. The defendant argued that this caused the public defenders to serve two clients, the defendant and the judge in whose courtroom they worked, preventing an independent and zealous defense. The

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<sup>250</sup>438 N.E.2d at 1004-05 (footnotes omitted).

<sup>251</sup>*Id.* at 1005.

<sup>252</sup>445 N.E.2d 565 (Ind. 1983).

<sup>253</sup>*Id.* at 569. See also *Phillips v. State*, 441 N.E.2d 201 (Ind. 1982); *Jackson v. State*, 441 N.E.2d 29 (Ind. Ct. App. 1982).

<sup>254</sup>436 N.E.2d 335 (Ind. Ct. App. 1982).

<sup>255</sup>*Id.* at 338.



defendant urged that the public defenders were acting as amici curiae rather than independent advocates in violation of the Code of Professional Responsibility. The court of appeals rejected these arguments and concluded that absent proof that some improper pressure was exerted on the public defenders, directly or indirectly, indigent defendants in Lake County were ensured the "guiding hand of counsel."<sup>256</sup>

### *E. Guilty Pleas*

1. *Advisements Concerning Sentencing.*—One of the most frequently litigated issues in recent years has been whether the trial court, before accepting a guilty plea, has properly advised the defendant of the range of possible sentences he might receive if the plea is accepted. This admonition by the trial judge is required by statute. Indiana Code section 35-35-1-2(a)(3) states that the court may not accept a guilty plea without first informing the defendant "of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and of any possibility of the imposition of consecutive sentences."<sup>257</sup>

Many recent cases have challenged the lower courts' advisements to defendants concerning possible maximum and minimum sentences. In *Brown v. State*,<sup>258</sup> the Indiana Supreme Court explained that it is the crime to which the defendant is pleading guilty that determines the range of penalties of which the defendant must be advised, not the charges that may have been dismissed as part of a plea agreement.

The defendant in *Brown* was originally charged with attempted murder. He subsequently pled guilty to attempted voluntary manslaughter pursuant to a plea agreement. On appeal the defendant contended that his guilty plea was not knowingly, intelligently, and voluntarily made because he was not informed of the minimum possible sentence he might have received on the original attempted murder charge had he proceeded to trial. A factual dispute regarding whether the defendant was advised of the penalties for attempted murder existed, but the record was clear that he had been advised of the maximum and minimum possible sentences for attempted voluntary manslaughter, the crime to which he pled guilty. The supreme court said that to satisfy the statutory requirement, the trial court must advise the defendant of the range of possible sentences for the offense to which the defendant actually pleads guilty. The court noted that a "[d]efendant is entitled to be informed of the actual penal consequences of his plea of guilty, not the hypothetical result of a trial on a charge which the State has agreed not to prosecute in return for the plea."<sup>259</sup>

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<sup>256</sup>*Id.* at 340 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)).

<sup>257</sup>IND. CODE § 35-35-1-2(a)(3) (1982).

<sup>258</sup>443 N.E.2d 316 (Ind. 1983).

<sup>259</sup>*Id.* at 319.



Although *Brown* clearly explains that the trial court need only advise the defendant of the potential penalties for the crime to which he is pleading guilty, the exact nature of that advisement remained a source of confusion in Indiana until the supreme court decided *Johnson v. State*.<sup>260</sup> In *Johnson*, the defendant pled guilty to murder and was advised by the trial judge that if his plea were accepted, he could be sentenced for more than the presumptive period of forty years. However, the judge did not discuss the effect that the defendant's prior convictions could have on the sentence. Subsequently, the defendant was sentenced to fifty years imprisonment. In post-conviction relief proceedings, the defendant sought reversal of the trial court's judgment on the ground that "his advisements were deficient in that he was not advised that his prior convictions could be considered as aggravating circumstances for sentencing purposes."<sup>261</sup> The defendant contended that the deficient advice constituted a violation of Indiana Code section 35-35-1-2.<sup>262</sup>

The State argued that the trial court had complied with the statute because it had advised the defendant of the minimum and maximum sentences and that aggravating and mitigating factors could be considered in increasing or decreasing the presumptive sentence.<sup>263</sup> In support of its argument the State relied on the court of appeals' decision in *VanDerberg v. State*,<sup>264</sup> which held that "the trial court did not have to inform [the defendant] that his prior convictions could result in the aggravated sentence."<sup>265</sup>

The supreme court disagreed with the State's argument, expressly disapproved *VanDerberg*, and concluded that compliance with Indiana Code section 35-35-1-2 required the trial judge to "specifically advise [the defendant] that his prior convictions could be considered aggravating circumstances for sentencing purposes,"<sup>266</sup> or that the record "reflect that [the defendant] was aware that his prior convictions could result in an increased sentence."<sup>267</sup>

Another recent decision emphasized the importance of advising a defendant of the minimum sentence for the crime with which he is charged before the court accepts his guilty plea. In *McKinney v. State*,<sup>268</sup> the defen-

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<sup>260</sup>453 N.E.2d 975 (Ind. 1983). It should be noted that the *Johnson* case was decided well after this survey period had ended; however, because this case overruled one decision during the survey period, *VanDerberg v. State*, 434 N.E.2d 936 (Ind. Ct. App. 1982), and clarified this area of criminal law, it is discussed in this Survey Article.

<sup>261</sup>453 N.E.2d at 976.

<sup>262</sup>See *supra* text accompanying note 257.

<sup>263</sup>453 N.E.2d at 977.

<sup>264</sup>434 N.E.2d 936 (Ind. Ct. App. 1982), *overruled*, 453 N.E.2d 975, 977 (Ind. 1983).

<sup>265</sup>453 N.E.2d at 977 (quoting *VanDerberg v. State*, 434 N.E.2d 936, 938 (Ind. Ct. App. 1982)).

<sup>266</sup>See 453 N.E.2d at 978 (Pivarnik, J., dissenting).

<sup>267</sup>*Id.* at 977.

<sup>268</sup>442 N.E.2d 727 (Ind. Ct. App. 1982).

dant entered a plea of guilty to burglary as a Class B felony and to one other charge. The plea agreement called for the defendant to receive an executed sentence of ten years on the burglary charge and a consecutive executed sentence on the other.<sup>269</sup> The trial court accepted the plea agreement, but sentenced the defendant to eight years on the burglary charge and two years on the second charge, to be served consecutively.

The third district court of appeals reversed. The trial court had not advised the defendant of the minimum possible sentence for burglary because the defendant had pled guilty pursuant to a plea agreement which called for a specific sentence. The trial court, therefore, believed that advice concerning the minimum sentence would have been "superfluous."<sup>270</sup> The court of appeals reasoned that a specified sentence in a plea agreement does not remove the trial court's obligation to give proper advisements. The majority concluded that correct advisement concerning the minimum sentence not only ensures that the defendant makes an informed decision to plead guilty, but also helps avoid unnecessary appeals.<sup>271</sup>

Judge Hoffman dissented, arguing that once the trial court accepted the plea agreement, it was bound by the terms of the agreement, including the specified sentence.<sup>272</sup> Therefore, it was difficult to perceive how the defendant could have been prejudiced by the court's failure to inform him of the minimum sentence. Moreover, the defendant actually received a lesser sentence than specified in the plea agreement. The dissent would have remanded the case to the trial court with instructions to sentence the defendant in accordance with the agreement.

In another decision involving advice of sentence ranges, the first district court of appeals reversed a conviction based on a guilty plea. In *Helton v. State*,<sup>273</sup> the defendant had been properly advised of the minimum sentence at his arraignment but was not properly advised at the time of his guilty plea fifty-nine days later. The court of appeals held that this time gap between the proper advisement and the entry of the plea was fatal to the conviction.<sup>274</sup>

Another issue that has arisen frequently in recent years is whether a defendant must be advised of the "collateral" sentencing consequences of his guilty plea.<sup>275</sup> During the survey period, the Indiana Court of Ap-

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<sup>269</sup>*Id.* at 728 (Hoffman, J., dissenting).

<sup>270</sup>*Id.*

<sup>271</sup>*Id.* at 727.

<sup>272</sup>*Id.* at 728 (Hoffman, J., dissenting); see also *Phillips v. State*, 441 N.E.2d 201 (Ind. 1982); *State ex rel. Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981); IND. CODE § 35-35-1-2(a)(4) (1982).

<sup>273</sup>443 N.E.2d 1201 (Ind. Ct. App. 1982).

<sup>274</sup>*Id.* at 1202. Compare *George v. State*, 403 N.E.2d 339 (Ind. 1980) (15 day period between advisement concerning constitutional rights and entry of plea did not invalidate plea) with *Beard v. State*, 176 Ind. App. 348, 375 N.E.2d 270 (1978) (70 day gap invalidated plea) and *Davis v. State*, 432 N.E.2d 67 (Ind. Ct. App. 1982) (advisement at preliminary hearing four months earlier too remote).

<sup>275</sup>Of course, labeling a consequence "collateral" usually answers the question of whether

peals handed down two superficially conflicting opinions on this issue. In *Catt v. State*,<sup>276</sup> the second district found several reasons to vacate a guilty plea. The court emphasized that the trial court misinformed the defendant that he was pleading guilty to a misdemeanor when he was actually pleading guilty to a felony. The court stated that "[t]he potential consequences of a felony conviction in light of the additional punishment assessable against a habitual offender render the characterization of Catt's plea as a misdemeanor plea material."<sup>277</sup> However, in *Owens v. State*,<sup>278</sup> the third district upheld the defendant's guilty plea despite the trial court's failure to advise him, before the plea was accepted, of "possible collateral consequences, such as the potential of a subsequent conviction as a habitual offender."<sup>279</sup> In a concurring opinion, Justice Garrard noted a common ground between *Catt* and *Owens*. Justice Garrard suggested that the better practice is at least to advise the accused that he is pleading guilty to a felony.<sup>280</sup> Neither decision would apparently require the trial judge to go further and advise the defendant about the myriad of potential future consequences of his guilty plea.<sup>281</sup>

2. *Written versus Oral Advisements.*—The strictness imposed upon trial court judges concerning advice to defendants who plead guilty was further emphasized by the Indiana Supreme Court's decision in *Early v. State*.<sup>282</sup> *Early* is the most recent in a series of cases concerning the advisement of an accused through a combination of written advisements signed by the defendant and oral advisements given by the judge at the time the plea is accepted. In an earlier case, *Clark v. State*,<sup>283</sup> a three-

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the defendant should be advised of it. In the past, Indiana courts have ruled that a guilty plea is not rendered involuntary when the defendant is not advised that the parole board could "set him back," i.e., require the sentence on his new conviction to begin only after he had completed his present term on another crime. *Jamerson v. State*, 394 N.E.2d 222 (Ind. Ct. App. 1979); *Odore v. State*, 178 Ind. App. 444, 382 N.E.2d 1024 (1978). Nor is it necessary to advise the defendant of his parole possibilities unless special parole provisions exist which are applicable to the crime he committed. *Romine v. State*, 431 N.E.2d 780 (Ind. 1982); *Greer v. State*, 428 N.E.2d 787 (Ind. 1981); cf. FED. R. CRIM. P. 11(c)(1) (requiring only advice of a "special parole term"). Also, where a guilty plea is challenged on the ground that the defendant has been incorrectly advised about sentencing, and the information in question is not statutorily required to be imparted by the trial court, the validity of the plea is measured by: "(1) whether the defendant was aware of actual sentencing possibilities and (2) whether accurate information would have made any difference in his decision to enter the plea." *Disney v. State*, 441 N.E.2d 489, 492 (Ind. Ct. App. 1982).

<sup>276</sup>437 N.E.2d 1001 (Ind. Ct. App. 1982).

<sup>277</sup>*Id.* at 1003.

<sup>278</sup>437 N.E.2d 501 (Ind. Ct. App. 1982).

<sup>279</sup>*Id.* at 504.

<sup>280</sup>*Id.* at 505 (Garrard, J., concurring).

<sup>281</sup>Certainly, a trial judge who accepts a defendant's guilty plea to a felony should not be required to advise the defendant that two more felonies may lead to habitual criminal sentencing. See STANDARDS RELATING TO CRIMINAL JUSTICE § 14-1.4(a)(iii) commentary at 14.25 (1979).

<sup>282</sup>442 N.E.2d 1071 (Ind. 1982).

<sup>283</sup>270 Ind. 104, 383 N.E.2d 321 (1978).

page plea agreement was submitted to the trial court. One paragraph of the agreement specified that the defendant understood and voluntarily waived his constitutional rights. The rights were listed in the plea agreement and the defendant signed his initials next to each. One of the initialed paragraphs advised the defendant of his right to have compulsory process. Before accepting the plea, the trial judge carefully questioned the defendant regarding his plea and whether he understood all his rights; but the judge neglected to ask the defendant whether he understood his right to compulsory process. A unanimous supreme court held that despite the trial court's omission "it is abundantly clear from the record as a whole that appellant was aware of and understood the full panoply of constitutional rights and the ramifications of his waiver of such rights."<sup>284</sup>

In a second case, *German v. State*,<sup>285</sup> the trial judge, who accepted a guilty plea, "failed to advise the defendants explicitly that by pleading guilty they were waiving certain rights; or that the plea of guilty was an admission of the facts alleged in the information or . . . that the court was not a party to the agreement."<sup>286</sup> Further, the trial judge had not specifically questioned the defendants to establish that their pleas were not the result of promises or threats. However, a written plea agreement advised the defendants of their rights and notified them that a guilty plea acts as a waiver of these rights. The defendants initialed each advisement. The trial judge had orally advised the defendants of certain rights, the charges against them, and the maximum and minimum sentences. The supreme court held that the trial judge must personally advise a defendant that a guilty plea operates as a waiver of constitutional rights. This requirement cannot be met by a defendant's initialing a written plea agreement advising him of the consequences of his guilty plea.

The most recent case, *Early v. State*,<sup>287</sup> appears to be much closer to *Clark* than to *German*. In *Early*, the record contained a plea agreement which set forth each advisement required by statute.<sup>288</sup> At the guilty plea hearing the trial judge apparently attempted to give the necessary advisements, but omitted the right to compulsory process, as the trial judge in *Clark* had done. The supreme court majority conceded that the facts were similar to *Clark* but said that "an essential link is missing."<sup>289</sup> The missing link was the trial court's failure to ask the defendant if he understood the terms of the plea agreement. Therefore, the court held that nothing in the record, other than the plea agreement itself, demonstrated that the defendant understood his right to compulsory process. This is a very narrow distinction from *Clark*, so narrow that *Early*

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<sup>284</sup>*Id.* at 106, 383 N.E.2d at 322.

<sup>285</sup>428 N.E.2d 234 (Ind. 1981).

<sup>286</sup>*Id.* at 235.

<sup>287</sup>442 N.E.2d 1071 (Ind. 1982).

<sup>288</sup>See IND. CODE § 35-35-1-2(a)(1), (2) (1982).

<sup>289</sup>442 N.E.2d at 1072.

appears to overrule *Clark*. The majority opinion emphasized the fine line drawn by the court.

Although the plea bargain agreement in the instant case reflects that the petitioner understood the rights therein enumerated, including the right to compulsory process, it did not come from the judge, and it did not come at the time of the waiver. In order for rights to be voluntarily waived, they must be known and understood *at the time of the waiver*. The waiver occurs simultaneously with the guilty plea; hence the judge must ascertain, *and the record must reflect*, that the defendant understands his rights and the effect of a guilty plea *at that very moment*. This is the critical time. What he knew or did not know at prior times, including the time when he signed the plea agreement, is immaterial except insofar as it may be an aid to the hearing judge and to us in determining what he comprehended and understood at the time the plea is given.<sup>290</sup>

Justice Hunter concurred with most of the majority opinion but wrote a separate opinion to express his disagreement with the last sentence quoted above. Justice Hunter found this sentence to be inconsistent with the basic thrust of the majority opinion—a signed plea agreement cannot assist an appellate court in determining what the defendant understood at the time he entered his plea.<sup>291</sup> Thus, *Early* sounds the death knell for utilizing a written plea agreement rather than oral advisement by the judge as a means for advising an accused in a felony case of his constitutional rights.<sup>292</sup>

3. *Advisements Concerning the Nature of the Charge*.—Another portion of the guilty plea statute which has received confusing interpretations by the courts is the requirement that the trial judge determine that the accused “understands the nature of the charge against him.”<sup>293</sup> One federal court has commented that there is no “simple or mechanical rule” concerning how the court is to determine the defendant’s understanding of the charge.<sup>294</sup> The dispute seems to be whether the judge accepting the plea must advise the defendant of all the elements of the crime to which he is pleading guilty or whether some other method, such as the

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<sup>290</sup>*Id.*

<sup>291</sup>*Id.* at 1076 (Hunter, J., concurring).

<sup>292</sup>In misdemeanor cases, Indiana law specifically provides that a defendant may be advised by a signed written waiver of rights without being orally advised by the trial judge. IND. CODE § 35-35-1-2(b) (1982). Further, as infractions and ordinance proceedings are now civil matters, *see* IND. CODE §§ 34-4-32-1 to -5 (1982 & Supp. 1983), there is no requirement that the defendant in an infraction or ordinance case receive the same advisements as a criminal defendant. *Wirgau v. State*, 443 N.E.2d 327 (Ind. Ct. App. 1982).

<sup>293</sup>IND. CODE § 35-35-1-2(a)(1) (1982).

<sup>294</sup>*United States v. Dayton*, 604 F.2d 931, 937-38 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *see also* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §3.37 (2d ed. 1982).

defendant's own recitation of the facts of the crime, will suffice to show that he understands the nature of the charge.

This conflict was highlighted in *Robinson v. State*,<sup>295</sup> a 1982 Indiana Supreme Court decision. The defendant entered a plea of guilty to murder, and later unsuccessfully sought post-conviction relief. Appealing the denial of post-conviction relief, the defendant contended that the trial court had not instructed him regarding the elements of murder and that "if the trial court had explained the elements to defendant then he would have understood that voluntary intoxication would be a defense to the crime and would not have pled guilty."<sup>296</sup> While otherwise adequately advising the defendant, the trial court failed to explain the elements of the offense. However, upon questioning from the trial judge and his own attorney, the defendant stated he was "well aware" of the charges against him.<sup>297</sup> The defendant told the judge he had admitted to the police that he had committed the crime and that he expressed remorse for it. The defendant also gave a detailed account of the murder. Statements by the defendant and his attorney indicated that support for an intoxication defense was unlikely. The majority opinion concluded that the trial court thoroughly questioned the defendant and his attorney to make sure that the accused understood the charges against him.

Justices Hunter and DeBruler dissented because of their belief that the record was inadequate to demonstrate that the defendant understood the nature of the charges against him. The dissenting opinion noted that "the record reveals the elements of the offense were never explained to him."<sup>298</sup> The dissent distinguished two earlier Indiana decisions because Robinson did not unequivocally admit each element of the crime and because an issue concerning Robinson's mental state and intent existed.<sup>299</sup> Although Robinson's exact statements were not set forth in great detail in the opinion, it appeared that the defendant admitted each element of the crime of murder. He recited the details of the crime and said that he shot a cab driver in the back during a robbery because he thought the driver was reaching for a weapon. This description of the crime appears to be as adequate as those in the two earlier cases Justice Hunter sought to distinguish, but Justice Hunter apparently believed that the admissions were rendered equivocal by the defendant's claim of intoxication.<sup>300</sup>

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<sup>295</sup>437 N.E.2d 73 (Ind. 1982).

<sup>296</sup>*Id.* at 73.

<sup>297</sup>*Id.* at 74.

<sup>298</sup>*Id.* at 75 (Hunter, J., dissenting).

<sup>299</sup>*Id.* (citing *DeVilz v. State*, 416 N.E.2d 846 (Ind. 1981); *Vertner v. State*, 400 N.E.2d 134 (Ind. 1980)).

<sup>300</sup>Justice Hunter indicated that the facts in *Robinson* brought the case within the ambit of *Henderson v. Morgan*, 426 U.S. 637 (1976). In *Morgan*, the defendant pled guilty to second degree murder, but was never informed that the intent to kill was an element of the crime of second degree murder. The Supreme Court found that *Morgan's* intent to

The better practice appears to be for a trial judge specifically to advise the defendant of the elements of the crime to which he is pleading guilty by reading the indictment or information or by some other method.<sup>301</sup> It should not be necessary, however, for the trial judge to break down the crime into its component elements and discuss each separately.<sup>302</sup> Nevertheless, where this practice is not followed, the *Robinson* case indicates that a defendant's detailed admission of the crime may be sufficient to show that he understands the nature of the charge.

4. *Determining the Voluntariness of the Plea.*—Another aspect of the trial court's responsibility to advise the defendant before accepting a guilty plea produced a split opinion by the Indiana Supreme Court in *James v. State*.<sup>303</sup> The issue was whether the trial court had made an adequate inquiry into the voluntariness of the guilty plea. The trial judge asked the defendant if he had signed the plea agreement voluntarily.<sup>304</sup> The trial court did not ask the defendant "whether any promises, force or threats were used to obtain the plea," although such a question was statutorily required.<sup>305</sup> At his post-conviction relief hearing, the defendant testified that he pled guilty because his attorney so advised him and because his codefendants threatened him and his family. A majority of the supreme court agreed with the State's argument that the statute was "designed to protect defendants against improper coercion by police or prosecutors; not third parties."<sup>306</sup> The majority viewed the statutory language as a codification of its earlier decisions which required the trial court to determine whether the State promised the defendant leniency in return for a plea of guilty.<sup>307</sup>

The dissent, on the other hand, was troubled by the trial court's obvious failure to follow the statutory mandate and inquire into the voluntariness of the plea. Moreover, the dissent believed that threats by persons other than the police or prosecutor were relevant to the issue of voluntariness.<sup>308</sup>

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commit the crime was questionable. However, unlike the defendant in *Robinson*, the defendant in *Morgan* gave no factual statement implying that he had the necessary intent.

<sup>301</sup>C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 173 (1982).

<sup>302</sup>Heckert v. State, 396 N.E.2d 132 (Ind. 1979); cf. Davis v. State, 418 N.E.2d 256 (Ind. Ct. App. 1981).

<sup>303</sup>433 N.E.2d 1188 (Ind. 1982) (3-2 decision).

<sup>304</sup>*Id.* at 1191 (DeBruler, J., dissenting).

<sup>305</sup>IND. CODE § 35-4.1-1-4 (1976) (current version at IND. CODE § 35-35-1-3(a) (Supp. 1983)).

<sup>306</sup>433 N.E.2d at 1190.

<sup>307</sup>See Watson v. State, 261 Ind. 97, 300 N.E.2d 354 (1973); Dube v. State, 257 Ind. 398, 275 N.E.2d 7 (1971).

<sup>308</sup>433 N.E.2d at 1191 (DeBruler, J., dissenting).

[I]f threats be made against the accused or his family by relatives and friends of the putative victim, witnesses, or others having an interest in the outcome of the case, those threats are material to a rational determination of whether plea is being made voluntarily. Indeed, prior to the enactment of this modern statute,



5. *Records of Guilty Pleas.*—Another problem that frequently arises with guilty pleas is that a record or transcript of the guilty plea proceedings is not made or is destroyed. This is especially true in misdemeanor cases in a city or town court, which are not courts of record.<sup>309</sup> The guilty plea statute does not state that a defendant in a misdemeanor case need not receive the same advice from the court as a defendant in a felony case; indeed, the statute implies the opposite when it says that in a misdemeanor case the requirement of the statute may be satisfied by a signed written waiver.<sup>310</sup> However, the Indiana Supreme Court requires that a record be kept in felony cases only.<sup>311</sup> Of course, a knowing, intelligent, and voluntary entry of a guilty plea cannot be presumed from a silent record, let alone an absent one.<sup>312</sup> Thus, it is reasonable to anticipate many challenges to prior misdemeanor convictions on the basis of inadequate or missing records of guilty pleas. The most frequent challenges can be expected from defendants attempting to avoid prosecution as a second offender for driving under the influence,<sup>313</sup> or adjudication as an habitual traffic offender.<sup>314</sup>

One recent Indiana decision set aside a 1964 guilty plea to a felony offense which was used to support an habitual offender adjudication, because no adequate record of the guilty plea proceedings had been preserved.<sup>315</sup> However, another decision, *Zimmerman v. State*,<sup>316</sup> demonstrated the use of a procedure that may be attempted if a record of the guilty plea hearing is lost or destroyed. In *Zimmerman*, a tape recording of the guilty plea proceeding was made but had been lost or destroyed. Apparently the recording had not been reduced to a transcript. In the post-conviction hearing challenging the plea, the judge who accepted the plea and the prosecutor who tried the case said that they had made copious notes of the proceeding. The judge presiding at the post-conviction hearing ordered the State to submit a record pursuant to Ap-

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this Court held that a plea induced by fear of violence from angry and excited mobs was involuntary in the legal sense. This issue, has been debated by English and American judges for more than three centuries. I regard the [case of *Sanders v. State*, 85 Ind. 318 (1882)] as placing this State on that side of the question which renders promises engendering hope for benefit and threats creating fear and terror as being material in making a judicial determination of the voluntariness of a plea of guilty to a criminal charge. A plea induced by improper promises or threats by private citizens lacks the essential quality of trustworthiness and should not be received in an Indiana court of law.

*Id.* (citation omitted).

<sup>309</sup>IND. CODE § 33-10.1-5-7 (1982).

<sup>310</sup>IND. CODE § 35-35-1-2(b) (1982).

<sup>311</sup>IND. R. CRIM. P. 10.

<sup>312</sup>*Campbell v. State*, 262 Ind. 594, 321 N.E.2d 560 (1975); *Brimhall v. State*, 258 Ind. 153, 279 N.E.2d 557 (1972).

<sup>313</sup>See IND. CODE § 9-11-2-3 (Supp. 1983).

<sup>314</sup>See *id.* § 9-4-13-3.

<sup>315</sup>*Ives v. State*, 436 N.E.2d 370 (Ind. Ct. App. 1982).

<sup>316</sup>436 N.E.2d 1087 (Ind. 1982).



pellate Rule 7.2(A)(3)(c).<sup>317</sup> This record was submitted by the State and certified by the judge who presided at the guilty plea hearing. The defendant contended that his guilty plea should be set aside because of the State's violation of Criminal Rule 10, which requires the retention of the record of a guilty plea. A unanimous supreme court ruled that the loss of a record or transcript of a guilty plea hearing does not require vacation of a guilty plea per se and held that the reconstruction of the record under Appellate Rule 7.2(A)(3)(c) was proper.

6. *Recent Legislation.*—Some legislative changes should be noted. If a defendant wishes to withdraw a not guilty plea and enter a plea of guilty or guilty but mentally ill, he may now do so orally in open court and need not state any reason for the withdrawal of the plea.<sup>318</sup> Previous statutory language provided that a defendant must show good cause to withdraw a not guilty plea and file a verified motion to support it.<sup>319</sup> Additionally, the term plea agreement was added by the legislature and defined to mean "an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony or misdemeanor charge,"<sup>320</sup> and the definition of the term recommendation was altered to mean a proposal "that is part of a plea agreement."<sup>321</sup> The term plea agreement was substituted for the term recommendation throughout the statute governing the filing of a plea bargain with the court.<sup>322</sup> The previous plea bargaining statute was governed by the term recommendation which was defined as including only "a proposal by the prosecuting attorney to a court that: (1) a felony charge be dismissed; or (2) a defendant, if he pleads guilty to a felony charge, receive less than the presumptive sentence."<sup>323</sup> The amendments were made because a plea bargain may encompass more than these two options, including recommendations by the defendant to the court as well. By redefining recommendation as only a part of a plea agreement that is filed with the court, the complete con-

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<sup>317</sup>IND. R. APP. P. 7.2(A)(3)(c) provides:

If no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable, a party may prepare a statement of the evidence or proceedings from the best available means, including his recollection. If submitted contemporaneously with the matter complained of, the statement may be settled and approved by the trial court. If submitted thereafter, the statement shall be served on other parties who may serve objections or prepare amendments thereto within ten (10) days after service. The statement and any objections or prepared amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall become a part of the record and be included by the clerk of the trial court in the record.

<sup>318</sup>Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 17, 1983 Ind. Acts 1943, 1957-58 (codified at IND. CODE § 35-35-1-4(a) (Supp. 1983)).

<sup>319</sup>IND. CODE § 35-35-1-4(a) (1982) (amended 1983).

<sup>320</sup>*Id.* § 35-35-3-1 (Supp. 1983).

<sup>321</sup>*Id.*

<sup>322</sup>*Id.* §§ 35-35-3-3, -4 (Supp. 1983).

<sup>323</sup>*Id.* § 35-35-3-1 (1982) (amended 1983).

ditions of the plea bargain will now be disclosed to the court. Finally, in another effort to streamline the misdemeanor guilty plea process,<sup>324</sup> the legislature provided that a plea agreement in a misdemeanor case may be submitted orally to the court.<sup>325</sup>

### F. Jury Trial

1. *Double Jeopardy*.—During the past survey period two cases dealt with an issue which had never previously been directly decided by an Indiana court. Both cases dealt with the trial court's failure to swear in a jury prior to the commencement of trial. In *Steele v. State*,<sup>326</sup> opening statements and the testimony of five witnesses were taken on the first day of trial. At the beginning of the second day, the defendant made a motion for mistrial because the court did not swear in the jury before the trial began. This motion was denied, the trial court swore in the jury, and the trial continued, resulting in the conviction of the defendant. The third district court of appeals reversed the conviction. Citing an old Indiana case,<sup>327</sup> the court held that the proper procedure would have been to discharge the jury, swear in the same panel of jurors or a new panel, and begin the trial anew.

This same issue arose in an earlier case, *Whitehead v. State*.<sup>328</sup> In *Whitehead*, opening statements were made and the jury heard the testimony of the first witness before the trial court discovered that the jury had not been sworn. The defendant moved for a mistrial, which the trial court denied, subject to reconsideration.<sup>329</sup> The jury was sworn in and the first witness was reexamined over the defendant's objection. The prosecutor subsequently told the court that the State had no objection to the defense mistrial motion. The mistrial was granted, and the defendant's attorney did not object to the granting of the mistrial or the discharge of the jury. After the trial judge was disqualified and another judge was selected to try the case, the defendant filed a motion for discharge, claiming that another trial would constitute double jeopardy. This motion was denied and an interlocutory appeal was brought. The court of appeals affirmed the trial court in this case because it found that the defendant, by moving for a mistrial, had thereby waived his double jeopardy claim.<sup>330</sup>

Another double jeopardy issue arose in *Haggard v. State*.<sup>331</sup> In this case the defendant robbed a liquor store in County A<sup>332</sup> and forced a

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<sup>324</sup>See *supra* note 292 and accompanying text.

<sup>325</sup>IND. CODE § 35-35-3-3(c) (Supp. 1983).

<sup>326</sup>446 N.E.2d 353 (Ind. Ct. App. 1983).

<sup>327</sup>*Leas v. Patterson*, 38 Ind. 465 (1872).

<sup>328</sup>444 N.E.2d 1253 (Ind. Ct. App. 1983).

<sup>329</sup>The trial judge said that he would "research the question and reconsider his ruling." The trial judge also reviewed a brief filed by the defendant's counsel overnight. *Id.* at 1254.

<sup>330</sup>*Id.*

<sup>331</sup>445 N.E.2d 969 (Ind. 1983).

<sup>332</sup>Bartholomew County, Indiana. *Id.* at 971.

cashier to leave with him in her car. They drove to County *B*,<sup>333</sup> where the defendant raped the cashier. He pled guilty to confinement, robbery, and theft charges in County *A*. He subsequently pled guilty to confinement and rape in County *B* and was sentenced for both. The Indiana Supreme Court ruled that only one continuous act of confinement had been committed and that the conviction and sentence for that offense in County *B* was a violation of double jeopardy principles.<sup>334</sup>

Another double jeopardy issue was involved in *Webster v. State*.<sup>335</sup> Generally, if a conviction is reversed on appeal on the grounds of insufficiency of the evidence at trial, a retrial of the case is barred by double jeopardy principles.<sup>336</sup> However, in *Webster*, the supreme court reaffirmed its ruling in an earlier disposition of the case and held that if the insufficiency of evidence is caused by an erroneous trial court ruling excluding evidence, then double jeopardy does not bar a retrial.<sup>337</sup>

Finally, a statutory provision which has created confusion since its adoption in 1977 was, at last, interpreted by the Indiana Court of Appeals.<sup>338</sup> In *State v. Burke*,<sup>339</sup> the defense attorney argued that under Indiana Code section 35-41-4-4, all offenses arising out of a criminal transaction must be joined in one trial or be thereafter barred. In *Burke*, a police officer had stopped a car and issued a ticket to Burke for being a minor in possession of alcohol. The officer also discovered marijuana and phencyclidine in the the car. Four days after the crime the defendant pleaded guilty to the alcohol charge and was fined. A month later the State filed a two count information charging Burke with possession of marijuana and phencyclidine. The defendant moved to dismiss these charges, arguing that the State was statutorily required to file these charges at the time the alcohol offense was filed. The trial court agreed and dismissed the charges.

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<sup>333</sup>*Harrison County, Indiana. Id.*

<sup>334</sup>*Id.* at 972-73. The court rejected a "same transaction" principle of double jeopardy. That is, even though the rape and the confinement were part of a continuing criminal episode, they were separate crimes for which a defendant could be separately convicted and sentenced. *Id.* at 972. *Cf. Lutes v. State*, 401 N.E.2d 671 (Ind. 1980) (defendant waived double jeopardy protection by knowingly pleading guilty to same rape offense in two separate counties).

<sup>335</sup>442 N.E.2d 1034 (Ind. 1982).

<sup>336</sup>*Burks v. United States*, 437 U.S. 1 (1978).

<sup>337</sup>442 N.E.2d at 1034 (citing *Webster v. State*, 413 N.E.2d 898, 902 (Ind. 1980) (Pren-tice, J., dissenting)).

<sup>338</sup>IND. CODE § 35-41-4-4 (1982) provides in part:

(a) A prosecution is barred if all of the following exist:

(1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.

(2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.

(3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

<sup>339</sup>443 N.E.2d 859 (Ind. Ct. App. 1983).

The State and the defense both agreed that the first two subsections of the statute had been satisfied because there had been a former prosecution for a different offense and there had been a conviction. The issue was whether the defendant "should have been charged in the former prosecution."<sup>340</sup> In reversing the trial court, the court of appeals began by noting that Indiana has rejected the "same transaction" approach to double jeopardy, thus there was no constitutional requirement that the offenses be joined.<sup>341</sup> Furthermore, Indiana has a permissive rather than mandatory joinder statute.<sup>342</sup> Therefore, there was also no statutory requirement that the offenses be joined.

2. *Alibi Defense*.—One of the more important alibi cases in the past year arose in the Seventh Circuit Court of Appeals' decision in *Alicea v. Gagnon*.<sup>343</sup> The Seventh Circuit held that a state notice of alibi statute was unconstitutionally applied to prevent a criminal defendant from testifying in his own behalf about his alibi, although the defendant did not comply with a notice of alibi statute. This holding conflicts with an earlier Indiana Court of Appeals case.<sup>344</sup> The decision in *Alicea* was based upon the court's conclusion that a defendant's right to testify on his own behalf outweighs the state's interest in strictly applying the notice of alibi statute.<sup>345</sup> The Seventh Circuit's decision, therefore, should not prevent the exclusion of the testimony of alibi witnesses other than the defendant himself if there is non-compliance with the notice statute.<sup>346</sup>

In another alibi case, *Brown v. State*,<sup>347</sup> the Indiana Supreme Court held that the trial court did not abuse its discretion when it denied the defendant's motion to strike the State's alibi response where the State was a day or two late in filing the response. The court emphasized that the defendant did not indicate what prejudice he suffered as a result of the late response and noted that the defendant did not avail himself of the potential remedy of a continuance.<sup>348</sup>

3. *Entrapment Defense*.—In *Baird v. State*,<sup>349</sup> the Indiana Supreme Court reversed a defendant's conviction on the ground that the State had failed to rebut an entrapment defense. In this case, police took a nineteen-

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<sup>340</sup>*Id.* at 861.

<sup>341</sup>*See supra* note 334.

<sup>342</sup>IND. CODE § 35-34-1-9 (1982).

<sup>343</sup>675 F.2d 913 (7th Cir. 1982).

<sup>344</sup>*Hartman v. State*, 176 Ind. App. 375, 383, 376 N.E.2d 100, 105 (1978) (stating that a defendant's due process rights are not violated by requiring the "exclusion of the defendant's testimony where notice of alibi has not been filed and where the defendant has not shown 'good cause' for failure to do so"). *Accord Lake v. State*, 257 Ind. 264, 274 N.E.2d 249 (1971).

<sup>345</sup>675 F.2d at 923-24.

<sup>346</sup>*See also* IND. CODE § 35-36-4-3(b) (1982).

<sup>347</sup>436 N.E.2d 285 (Ind. 1982).

<sup>348</sup>*Id.* at 288.

<sup>349</sup>446 N.E.2d 342 (Ind. 1983) *vacating*, 440 N.E.2d 342 (Ind. Ct. App. 1982).

year-old man to a liquor store, gave him some money, and told him to go into the store and buy an alcoholic beverage. He was instructed that if he was questioned about his age he was to explain that he had no identification and leave the store. The young man went into the store and purchased a six-pack of beer from the defendant clerk. The police did not alter the young man's appearance, but testimony indicated that he looked older than nineteen years of age. The defendant testified that the liquor store's policy was to require proof of age "if the customer was a stranger, appeared to be nervous, and appeared to be under twenty-five years of age."<sup>350</sup> The defendant said that he did not remember selling the beer to the young man but that he always followed the store's policy. There had been no previous complaints of the defendant selling alcoholic beverages to minors. Nor did the State introduce any evidence of predisposition to commit the crime.

The supreme court found that under both case law and the entrapment defense statute,<sup>351</sup> the State must prove two elements to rebut an entrapment defense: police activity in the transaction and predisposition on the part of the accused to commit the offense.<sup>352</sup> The court stated:

It is clear that in order to rebut the defense of entrapment the State must show two things; i.e., first, that the level of police activity was not such that it would persuasively affect the free will of the accused, and second, that the accused was predisposed to commit the offense. Part (b) of the statute is explanatory of the level of police activity that would be necessary to support the entrapment defense but this section does not negate the requirement of the necessary predisposition on the part of the accused. We have consistently held that *if* the accused had the predisposition to commit the crime and the police merely afforded him an opportunity to do so, then the defense of entrapment is not available.<sup>353</sup>

*Baird* is a very difficult case to fit into the entrapment defense theory, for it appears there was neither predisposition nor police activity likely to persuade someone to commit a crime. The facts in *Baird* distinguish it from the typical drug entrapment case where the mere possession of

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<sup>350</sup>446 N.E.2d at 343.

<sup>351</sup>IND. CODE § 35-41-3-9 (1982) provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

<sup>352</sup>446 N.E.2d at 344.

<sup>353</sup>*Id.*

illicit drugs, especially where the seller has a ready supply and knowledge of "street" prices, in itself, indicates a predisposition. In *Baird*, a clerk in a licensed liquor store sold alcoholic beverages to someone who did not appear to be underage. This is hardly overwhelming evidence of predisposition. On the other hand, there apparently was no police encouragement of the clerk to make the sale, other than simply presenting the clerk with the opportunity. The court of appeals opinion conducted a much more thorough examination of the entrapment issue than the supreme court's opinion and is probably more in accord with the legislative intent behind the entrapment statute.<sup>354</sup> Moreover, offenses such as selling alcoholic beverages to a minor<sup>355</sup> seem to be "strict liability" crimes because they simply declare it "unlawful" to sell alcoholic beverages to a minor, without stating a required mental state such as intentionally, knowingly, or recklessly selling to a minor. Whether the entrapment defense should even apply to a strict liability crime is an interesting question.<sup>356</sup> Nevertheless, the facts of the *Baird* case make it difficult to fault the result reached by the supreme court.<sup>357</sup>

4. *Insanity Defense*.—The most significant insanity defense case decided in the past survey period was *Taylor v. State*,<sup>358</sup> sustaining the constitutionality of Indiana's guilty but mentally ill statute.<sup>359</sup> The defendant claimed that this statute violated due process, equal protection, and deprived him of privileges and immunities guaranteed by the Constitution. His argument centered on an allegation that the statutory definitions of insanity<sup>360</sup> and mentally ill<sup>361</sup> are so vague that the verdicts of not guilty by reason of insanity and guilty but mentally ill are essentially the same, resulting in the selective and arbitrary application of the two verdicts. In the alternative, the defendant contended that the terms insanity and mentally ill were so vague and overbroad that he was denied reasonable notice of the charge against him. Finally, the defendant argued that whether a person was insane or mentally ill, he was incapable of forming the intent necessary for the imposition of criminal penalties.

While the supreme court conceded that the definitions of both in-

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<sup>354</sup>See 440 N.E.2d 1143 (Ind. Ct. App. 1982).

<sup>355</sup>IND. CODE § 7.1-5-7-8(a) (Supp. 1983).

<sup>356</sup>However, the applicability of the entrapment defense to charges of violating laws regulating the sale of liquor is apparently of widespread and long-standing vintage. See Annot., 55 A.L.R.2d 1322 (1957); see also IND. CODE § 7.1-5-7-5.1 (Supp. 1983).

<sup>357</sup>Two other entrapment cases of interest were also decided during the survey period. The fourth district court of appeals conducted an extensive analysis of the entrapment defense in ruling on a particular entrapment jury instruction in *Hardy v. State*, 442 N.E.2d 378 (Ind. Ct. App. 1982). In *Whalen v. State*, 442 N.E.2d 14 (Ind. Ct. App. 1982), the first district court of appeals held that a motion to suppress is not a proper procedure to assert an entrapment defense.

<sup>358</sup>440 N.E.2d 1109 (Ind. 1982).

<sup>359</sup>IND. CODE § 35-36-2-3 (1982) (formerly IND. CODE § 35-5-2-3 (Supp. 1981)).

<sup>360</sup>IND. CODE § 35-41-3-6 (1982).

<sup>361</sup>*Id.* §§ 35-36-1-1, 35-36-2-3(4).

sanity and mental illness involve similar behavioral characteristics and may overlap on occasion, the court stated that "a mental disease or deficiency does not *ipso facto* render a defendant legally insane."<sup>362</sup> The court found that the statutory distinction between mental illness and insanity was clearly drawn to focus correctly on whether a defendant acts with the requisite mens rea for the offense with which he is charged. The court also rejected the defendant's due process challenge, finding that the allegations in the information and the statutory language gave the defendant full notice of the charges against him and apprised him of the role mental illness and insanity would play in the trial. Additionally, the court rejected the defendant's claim that the terms were so broad that a jury was vested with unlimited discretion in applying them. The choice between the verdicts not responsible by reason of insanity and guilty but mentally ill<sup>363</sup> is no more difficult for the jury to apply than the former choice between sanity and insanity.<sup>364</sup>

5. *Self-Defense—Battered Woman Syndrome.*—The third district court of appeals decision in *Fultz v. State*<sup>365</sup> made it clear that a defendant seeking to assert a "battered woman syndrome" defense must first demonstrate facts which would support an ordinary self-defense claim. In *Fultz*, the defendant offered to prove that she had been subjected to a series of severe beatings by the victim over a number of years. She also offered to prove by expert testimony that she had become affected by a battered woman syndrome and that this led her to shoot the victim when he pointed his finger at her menacingly and uttered an inaudible threat. This evidence was excluded.

The State argued that the evidence was correctly excluded because "the victim had not committed an aggressive act sufficient for Fultz to form a reasonable belief that the imminent use of force was necessary."<sup>366</sup> The court of appeals agreed, finding that "[b]efore evidence of the victim's violent character can be admitted, the defendant must show . . . that the victim's aggression was the proximate or efficient cause justifying the defendant's acts of self-defense."<sup>367</sup>

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<sup>362</sup>440 N.E.2d at 1111.

<sup>363</sup>IND. CODE § 35-36-2-3 (1982).

<sup>364</sup>The supreme court stated:

The "guilty but mentally ill" verdict serves the state's interest in securing convictions justly obtained and in obtaining treatment for those convicted defendants who suffer mental illness. The classification is thus one which is reasonably related to a legislative purpose, as is necessary to withstand an equal protection attack. Nor can it be said that the statutory definitions and alternative verdicts are not equally available to persons similarly situated; the application of the classifications rests on the evidence regarding any particular defendant's mental condition. There is no patent inequity to support an equal protection or privileges and immunities claim.

440 N.E.2d at 1112 (citations omitted).

<sup>365</sup>439 N.E.2d 659 (Ind. Ct. App. 1982).

<sup>366</sup>*Id.* at 662.

<sup>367</sup>*Id.*

6. *Jury Instructions.*—The entire Criminal Law Survey Article could be devoted to an analysis of recent instruction cases, especially those on lesser included offenses.<sup>368</sup> The issue of whether an instruction is warranted on an included offense in any particular case often requires a complex analysis concerning the issues of whether the offense is actually included as a matter of law, and whether it is included given the facts of the particular case. Two valid but often conflicting rationales contribute to the complexity of this area of criminal law. First, a jury should not be encouraged to return a “compromise verdict.” If a defendant is charged with armed robbery and his only defense is that he is not the one who committed the crime, not that he was unarmed, the question of whether the jury should be instructed on the included offense of robbery arises. On the other hand, close factual questions can occur over the exact nature of the defense in the case or a factual dispute may exist about a mental element distinguishing the greater and the lesser offense. In those situations the trial judge must virtually weigh the evidence before deciding to give instruction on an included offense. This is a difficult task for a trial judge, and, obviously, an equally difficult issue for the appellate courts to resolve.

The complexity of this issue was demonstrated in the decision of *Johnson v. State*.<sup>369</sup> Johnson was convicted of battery as a Class C felony. The third district court of appeals, in a decision containing three opinions, reversed the conviction on the basis that the trial court erred in refusing to give certain tendered instruction.<sup>370</sup> The supreme court granted transfer and reversed the court of appeals, but the supreme court decision produced a majority opinion and two separate concurring opinions. Thus, in two appellate decisions eight judges wrote six separate opinions.

During his trial for Class C battery,<sup>371</sup> Johnson tendered two instructions, both of which the trial court refused to give. One instruction stated that if the jury was unable to find that the defendant acted knowingly or intentionally, but did find that he committed the acts recklessly, then he could be found guilty of the included offense of recklessly inflicting serious bodily injury.<sup>372</sup> The second instruction stated that if the defendant recklessly, knowingly, or intentionally inflicted serious bodily injury on another person the jury could find him guilty of criminal recklessness, a Class D felony.<sup>373</sup>

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<sup>368</sup>See IND. CODE § 35-41-1-16 (Supp. 1983) (defining included offense).

<sup>369</sup>435 N.E.2d 242 (Ind. 1982), *rev'g*, 426 N.E.2d 91 (Ind. Ct. App. 1981).

<sup>370</sup>426 N.E.2d at 104.

<sup>371</sup>IND. CODE § 35-42-2-1 (1982) provides that “[a] person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery. . . . However, the offense is: . . . a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.”

<sup>372</sup>435 N.E.2d at 244.

<sup>373</sup>*Id.* See IND. CODE § 35-42-2-2(b) (1982). This section provides that “[a] person who recklessly, knowingly, or intentionally inflicts serious bodily injury on another person commits criminal recklessness, a class D felony.” *Id.*



The facts of the case indicated that the defendant shot the victim in the chest after he had been fouled in a basketball game. There was evidence that defendant had smoked marijuana immediately before the game and had said he was high during the game. The victim testified that the defendant's eyes were "spaced and glazed over when the shooting occurred," and that the defendant appeared to be under the influence of drugs.<sup>374</sup> However, the defendant testified and "gave a clear and detailed description of the events leading up to and including the shooting."<sup>375</sup> The defendant also testified that he carried a pistol for protection because he knew the basketball games became rough. Johnson remembered pulling out the gun, shooting the victim in the chest, and saying, "Do you want some more?"<sup>376</sup>

In the majority opinion Justice Pivarnik delineated a two-step process for deciding whether instructions or lesser included offenses were erroneously refused.<sup>377</sup> First, the language of the statutes and the indictment or information must be compared to determine whether the greater offense includes the lesser. Second, the court must determine whether the included offense instruction is applicable to evidence introduced at the trial. The majority focused on the second test, stating that when the battery was accomplished by the direct act of pulling a pistol and firing it into the body of the victim, there was no necessity for an instruction on criminal recklessness. The majority also said that the alleged impairment of the defendant due to drugs would not warrant an instruction on recklessness. The majority pointed out that because neither battery nor recklessness is a specific intent crime, voluntary intoxication is not a defense to either offense.<sup>378</sup>

Justice Hunter concurred in the result only on the basis that voluntary intoxication is not a defense to the crime of battery.<sup>379</sup> Therefore, the two-step analysis of the majority was not required. However, Justice Hunter stated that if a factual dispute over the defendant's mental state had existed, then the two-step analysis would have required that the instruction on lesser included offenses be given. Moreover, Justice Hunter did not believe that the concept of an included offense or the meaning of the terms knowingly, intentionally, or recklessly were required jury instructions. Justice DeBruler's concurring opinion reiterated his past view that the second step of the two-part analysis discussed in the majority opinion, determining whether the evidence introduced at trial warrants

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<sup>374</sup>435 N.E.2d at 244.

<sup>375</sup>*Id.* at 244-45.

<sup>376</sup>*Id.* at 245.

<sup>377</sup>*Id.*

<sup>378</sup>IND. CODE § 35-41-3-5(b) (1982) provides that "[v]oluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent' to or 'with an intention to.' "

<sup>379</sup>435 N.E.2d at 247 (Hunter, J., concurring).

an included offense instruction, leads only to confusion and should be discarded.<sup>380</sup>

In another significant included offense case, *Jones v. State*,<sup>381</sup> the supreme court overruled an earlier decision<sup>382</sup> and held that criminal trespass may be an included offense of burglary, depending upon the allegations of the charging instrument.<sup>383</sup> The court noted that "while a particular offense may not be inherent in the greater offense, by definition, it may have been committed by reason of the manner in which the greater offense was committed."<sup>384</sup>

The Indiana Supreme Court also decided *Lacy v. State*<sup>385</sup> during the survey period. In this case, the court indicated that the total failure to give a jury instruction on the elements of the crime charged would be fundamental error, but that no fundamental error would occur where at least the preliminary instruction covered the elements.<sup>386</sup> In another decision the court held that a defendant cannot predicate error on the trial court's refusal to give an instruction if that instruction is not numbered or signed.<sup>387</sup> Additionally, the supreme court held that a defendant's waiver of the right to have final instructions read to the jury can be made by his attorney and need not be "knowingly" made by the defendant.<sup>388</sup>

### G. Hypnosis

Before 1982, the Indiana Supreme Court dealt only tangentially with the issue of hypnotizing witnesses.<sup>389</sup> During the survey period, however, the pre-trial hypnosis of witnesses was perhaps the most rapidly developing area of criminal law. It would be interesting to trace carefully the present state of hypnosis law in Indiana sequentially through the year. However, for the criminal law practitioner, only the most recent case, *Peterson v. State*,<sup>390</sup> is critically important. That is because the *Peterson*

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<sup>380</sup>*Id.* at 249-50 (DeBruler, J., concurring).

<sup>381</sup>438 N.E.2d 972 (Ind. 1982).

<sup>382</sup>*Estep v. State*, 394 N.E.2d 111 (Ind. 1979).

<sup>383</sup>*See also Walker v. State*, 445 N.E.2d 571 (Ind. 1983).

<sup>384</sup>438 N.E.2d at 974. Other interesting included offense cases are *Moore v. State*, 445 N.E.2d 576 (Ind. Ct. App. 1983) (assisting a criminal is an included offense of murder and attempted murder); *Lechner v. State*, 439 N.E.2d 1203 (Ind. Ct. App. 1982) (child molesting involving fondling was not an included offense of child molesting involving deviate sexual conduct); *Ford v. State*, 439 N.E.2d 649 (Ind. Ct. App. 1982) (holding that reckless homicide and involuntary manslaughter could be lesser included offenses, but were not under the facts of that case).

<sup>385</sup>438 N.E.2d 968 (Ind. 1982).

<sup>386</sup>*Id.* at 971.

<sup>387</sup>*Askew v. State*, 439 N.E.2d 1350 (Ind. 1982).

<sup>388</sup>*Rowley v. State*, 442 N.E.2d 343, 344 (Ind. 1982).

<sup>389</sup>*See Alleyn v. State*, 427 N.E.2d 1095 (Ind. 1981); *Pavone v. State*, 402 N.E.2d 976 (Ind. 1980); *Merrifield v. State*, 400 N.E.2d 146 (Ind. 1980).

<sup>390</sup>448 N.E.2d 673 (Ind. 1983). For a further discussion on the use of hypnotized witnesses, see Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 214 (1984).

case virtually ignores other hypnosis decisions decided only months before.

The first major Indiana hypnosis case, *Strong v. State*,<sup>391</sup> remains good law and was one case relied upon in the *Peterson* decision. In *Strong*, an eyewitness to a robbery and murder selected the defendant's photograph from a display the day after the crime. The witness was subsequently hypnotized by a police officer trained in hypnosis,<sup>392</sup> and a composite picture of the defendant was drawn based on the information the witness provided while under hypnosis. This composite picture was admitted at trial over the defendant's objection.

The Indiana Supreme Court held that the composite picture should have been excluded. The court stated that the "better-reasoned" hypnosis cases in the United States hold that evidence obtained from a witness under hypnosis is "inherently unreliable and should, therefore be excluded as having no probative value."<sup>393</sup> The court ruled that the "product" of hypnosis, if it elicits recall otherwise unavailable, is not subject to cross-examination and should be excluded. The composite picture was clearly the product of the hypnotic session. However, the supreme court also held that it was proper for the witness to make an in-court identification of the defendant. The witness' pre-hypnosis identification of the defendant demonstrated a basis for the in-court identification independent of the hypnosis. *Strong* left open the possibility that a witness' memory might be considered the product of a hypnotic session, if no independent basis for the memory were demonstrated, and indicated that a witness, rather than a composite photograph, might be excluded from a trial. Several subsequent cases held that a witness is not per se incompetent to testify simply because he has undergone pre-trial hypnosis, at least as to the corpus delicti of the crime.<sup>394</sup>

In *Pearson v. State*,<sup>395</sup> the Indiana Supreme Court conducted its most detailed analysis of the hypnosis issue. Justice Hunter's majority opinion<sup>396</sup> stated that rulings on the admissibility of the testimony of a witness who has undergone pre-trial hypnosis have followed three trends in the United States. Some jurisdictions have adopted a rule totally excluding the testimony of a witness about any events which were the subject of the hypnotic session.<sup>397</sup> Other jurisdictions have held that hypnotically-refreshed testimony could be admitted if certain safeguards were followed during the hypnotic session.<sup>398</sup> Still other jurisdiction hold that hypnotically-

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<sup>391</sup>435 N.E.2d 969 (Ind. 1982).

<sup>392</sup>The detective investigating the crime was also present during the hypnosis session. *Id.* at 970.

<sup>393</sup>*Id.*

<sup>394</sup>*Stewart v. State*, 442 N.E.2d 1026 (Ind. 1982); *Forrester v. State*, 440 N.E.2d 475 (Ind. 1982); *Morgan v. State*, 445 N.E.2d 585 (Ind. Ct. App. 1982).

<sup>395</sup>441 N.E.2d 468 (Ind. 1982).

<sup>396</sup>Justice Prentice wrote a concurring opinion. *Id.* at 476 (Prentice, J., concurring).

<sup>397</sup>*Id.* at 472 (citations omitted).

<sup>398</sup>*Id.* (citations omitted).

refreshed testimony is admissible with the problems inherent in its use going to the weight of the evidence.<sup>399</sup> In *Pearson*, the Indiana Supreme Court appeared to align itself with the third group.<sup>400</sup>

The most recent case in this area is *Peterson v. State*.<sup>401</sup> In *Peterson*, a key witness to a murder was able to tell police about the details of the crime but could not identify the perpetrators. He was unable to select the alleged murderer from a photographic display or a lineup. Over three months after the crime this witness was hypnotized. After one hypnosis session the witness identified a photograph of the defendant and selected a photograph of a man he called "the second guy."<sup>402</sup> The defendant unsuccessfully attempted to have the witness' identification testimony excluded from trial. The Indiana Supreme Court held that the trial court properly admitted the witness' testimony about the facts of the crime because the witness was able to relate this information to police before the hypnosis. However, the supreme court found that the trial court erred in permitting the identification testimony because it was a product of the hypnotic session and "inherently tainted."<sup>403</sup> Its admission denied the defendant his rights to confrontation and cross-examination.<sup>404</sup>

The present Indiana rule with regard to the admissibility of testimony of a witness who has undergone pre-trial hypnosis is unclear. Justice Hunter's concurring opinion in *Peterson* addressed this question and the following quotation provides some guidance to criminal law practitioners:

The instant case sets out this Court's position on the evidentiary use of testimony of a previously hypnotized witness as: (1) the witness is not totally incompetent to testify and there will be no error when the witness testifies to what was remembered before the hypnosis; (2) any evidence derived from a witness while he or she is under hypnosis is inherently unreliable and must be excluded as having no probative value; (3) if evidence that is the product of a hypnosis session is admitted during trial, it will not be reversible error if the jury is aware of all the circumstances surrounding the hypnosis session and the degree to which the witness's statements were changed by the hypnosis, and if the changes in the witness's statements were not significant or did not relate to essential elements of the offense. This position necessarily requires a case-by-case determination of the effect of

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<sup>399</sup>*Id.* (citations omitted). Some jurisdictions in this category also recommend the safeguards required by the decisions in the second category.

<sup>400</sup>The court stated that "the fact of hypnosis should be a matter of weight with the trier of fact but not a *per se* disqualification of the witness." *Id.* at 473 (citations omitted).

<sup>401</sup>448 N.E.2d 673 (Ind. 1983).

<sup>402</sup>*Id.* at 674.

<sup>403</sup>*Id.* at 678.

<sup>404</sup>The only Indiana hypnosis case cited in the majority opinion was *Strong v. State*, 435 N.E.2d 969 (Ind. 1982). *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982), was not mentioned.

the admission of testimony from a previously hypnotized witness, and I believe this brings about more equitable results than are possible under the "total exclusion" rule.<sup>405</sup>

### H. Sentencing

1. *Generally.*—Some of the more significant changes in the law governing the sentence imposed upon a criminal defendant are the result of legislation. For example, a new law provides that a court "may suspend only that part of the sentence that is in excess of the minimum sentence,"<sup>406</sup> and minimum sentence is defined as a certain number of years for certain grades of felonies.<sup>407</sup> The minimum penalty for a Class D felony was lowered to one year.<sup>408</sup> The legislature cleared up another problem area<sup>409</sup> by providing that a convicted defendant may be ordered to make restitution even if he is not placed on probation.<sup>410</sup>

Another sentencing problem which has arisen frequently was answered by the courts in the past year. Indiana law prohibits a trial judge from suspending the sentence for certain listed crimes,<sup>411</sup> but it was unclear whether suspension of the sentence for an attempt to commit those crimes was also prohibited.<sup>412</sup> In *Haggenjos v. State*,<sup>413</sup> the Indiana Supreme Court held that an attempt to commit one of the listed felonies is also a non-suspendable crime.<sup>414</sup> The Indiana court of appeals, however, has held that a conspiracy to commit one of the listed non-suspendable offenses is suspendable because conspiracy is not one of the listed crimes.<sup>415</sup>

2. *Habitual Offender.*—There were several major legislative enactments in the habitual offender area. First, following the impetus of *Sweet v. State*,<sup>416</sup> bifurcated trials similar to those required in habitual criminal

<sup>405</sup>448 N.E.2d at 679-80 (Hunter, J., concurring).

<sup>406</sup>Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 2, 1983 Ind. Acts 1992, 1993 (codified at IND. CODE § 35-50-2-2(b) (Supp. 1983)).

<sup>407</sup>"'Minimum sentence' means: (1) for murder, thirty (30) years; (2) for a Class A felony, twenty (20) years; (3) for a Class B felony, six (6) years; (4) for a Class C felony, two (2) years; and (5) for a Class D felony, one (1) year." Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 1, 1983 Ind. Acts 1992, 1993 (codified at IND. CODE § 35-50-2-1 (Supp. 1983)).

<sup>408</sup>Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 3, 1983 Ind. Acts 1992, 1994 (codified at IND. CODE § 35-50-2-7 (Supp. 1983)).

<sup>409</sup>See *Barnett v. State*, 414 N.E.2d 965 (Ind. Ct. App. 1981); see also *Johnson*, *supra* note 117, at 164.

<sup>410</sup>Act of Apr. 11, 1983, Pub. L. No. 337-1983, 1983 Ind. Acts 2000 (codified at IND. CODE § 35-50-5-3 (Supp. 1983)).

<sup>411</sup>Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 2, 1983 Ind. Acts 1992, 1993-94 (codified at IND. CODE § 35-50-2-2(b)(4) (Supp. 1983)).

<sup>412</sup>See IND. CODE § 35-41-5-1 (1982).

<sup>413</sup>441 N.E.2d 430 (Ind. 1982).

<sup>414</sup>*Id.* at 430. Haggenjos was convicted of attempted murder.

<sup>415</sup>*Huff v. State*, 443 N.E.2d 1234 (Ind. Ct. App. 1983).

<sup>416</sup>439 N.E.2d 1144 (Ind. 1982).

proceedings<sup>417</sup> will be required in all cases involving recidivist charges.<sup>418</sup> The habitual offender law itself was amended to exclude prior felony convictions involving substance offenses<sup>419</sup> and a separate statute was added to deal with these substance offenders.<sup>420</sup> An habitual prostitution statute was also adopted.<sup>421</sup>

So many habitual criminal cases were decided that no effort will be made to consider them in analytical detail. In at least two decisions, the Indiana Supreme Court made it clear that allegations of habitual criminal status must conform to most of the procedural formalities surrounding any other criminal charges.<sup>422</sup> The court indicated that the preferred procedure for a trial court to follow when a defendant is charged with a Class D felony and with habitual criminal status is to consider the presentence investigation report and arguments of counsel before entering judgment on the Class D felony and proceeding to the habitual offender phase of the trial.<sup>423</sup> This procedure is preferred because of the unique sentencing provisions for Class D felonies, which authorize a trial judge to enter the judgment as a conviction for a Class A misdemeanor,<sup>424</sup> in which case the defendant could not be considered for habitual criminal status.<sup>425</sup>

The supreme court also held that a defendant's voluntary testimony at a bond reduction hearing, where he admitted his prior convictions, may be introduced into evidence in the habitual offender portion of the trial.<sup>426</sup> The court also approved the technique of using former defense attorneys of defendants alleged to be habitual criminals to identify their former clients as the persons to whom the court records, used to prove the habitual charge, pertain.<sup>427</sup> However, the court held that the fact of the prior convictions could not be proved solely through the testimony of former defense counsel.<sup>428</sup>

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<sup>417</sup>IND. CODE § 35-50-2-8 (Supp. 1983).

<sup>418</sup>Act of Mar. 28, 1983, Pub. L. No. 324-1983, 1983 Ind. Acts 1969 (codified at IND. CODE § 35-38-1-19 (Supp. 1983)).

<sup>419</sup>Act of Apr. 18, 1983, Pub. L. No. 335-1983, Sec. 1, § 8(g), 1983 Ind. Acts 1995, 1996 (codified at IND. CODE § 35-50-2-8(g) (Supp. 1983)).

<sup>420</sup>Act of Apr. 18, 1983, Pub. L. No. 335-1983, § 2, 1983 Ind. Acts 1995, 1996-97 (codified at IND. CODE § 35-50-2-10 (Supp. 1983)).

<sup>421</sup>Act of Apr. 21, 1983, Pub. L. No. 310-1983, § 3, 1983 Ind. Acts 1855, 1860 (codified at IND. CODE § 35-45-4-2 (Supp. 1983)).

<sup>422</sup>*Anderson v. State*, 439 N.E.2d 558 (Ind. 1982); *Griffin v. State*, 439 N.E.2d 160 (Ind. 1982).

<sup>423</sup>*Gross v. State*, 444 N.E.2d 296, 299 (Ind. 1983).

<sup>424</sup>IND. CODE § 35-50-2-7(b) (Supp. 1983).

<sup>425</sup>*Id.* § 35-50-2-8(a) (habitual offender statute only applicable to defendants convicted of a *felony*).

<sup>426</sup>*Hernandez v. State*, 439 N.E.2d 625, 631 (Ind. 1982).

<sup>427</sup>*Poe v. State*, 445 N.E.2d 94, 98 (Ind. 1983); *Donnersbach v. State*, 444 N.E.2d 1184, 1185 (Ind. 1983).

<sup>428</sup>*Washington v. State*, 441 N.E.2d 1355, 1358-59 (Ind. 1982); *Morgan v. State*, 440 N.E.2d 1087, 1090 (Ind. 1982).



## VI. Domestic Relations

STEVEN E. KING\*

### A. Child Support

The law of child support received a healthy dose of development during the survey period, yielding both case precedent and legislative enactments with significant import.

1. *Nonconforming Child Support and the No-Credit Rule.*—Prior to the survey period, Indiana's appellate tribunals had, with one exception, invoked the letter of the rule that child support must be rendered in the same manner and amount and at the same times as required by the support order.<sup>1</sup> In *Castro v. Castro*<sup>2</sup> and *Payson v. Payson*,<sup>3</sup> however, the third and fourth districts of the court of appeals took issue with that broadly stated proposition. In both cases, noncustodial parents had been ordered to make support payments via the clerks' offices. Each instead made payments directly to the custodial parent; *Payson* also involved rental payments tendered to the custodial parent's landlord in lieu of child support. The evidence in both cases included acknowledgements by the custodial parent that nonconforming payments had been tendered and accepted. In subsequent contempt proceedings, both noncustodial parents were granted credit for the nonconforming payments. Both decisions were affirmed on appeal.

Both districts of the appeals court recognized that an unyielding application of the no-credit rule would elevate form over substance. In *Payson*, the unanimous court stated:

In a situation where, as here, the parties have *agreed to and carried out an alternate method of payment which substantially complies with the spirit of the original support decree*, we find it would be unfair to refuse to credit the non-custodial parent simply because the payments were not made through the clerk.<sup>4</sup>

The court in *Payson* noted that "an order making a support award payable

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<sup>1</sup>See, e.g., *Breedlove v. Breedlove*, 421 N.E.2d 739 (Ind. Ct. App. 1981); *Whitman v. Whitman*, 405 N.E.2d 608 (Ind. Ct. App. 1980); *Jahn v. Jahn*, 179 Ind. App. 368, 385 N.E.2d 488 (1979); *Stitle v. Stitle*, 245 Ind. 168, 197 N.E.2d 174 (1964). *But see* *Franklin v. Franklin*, 169 Ind. App. 537, 349 N.E.2d 210 (1976) (noncustodial parent given credit for actual support provided while the minor child was in his physical custody, albeit technically in violation of the court's custody and visitation orders).

<sup>2</sup>436 N.E.2d 366 (Ind. Ct. App. 1982).

<sup>3</sup>442 N.E.2d 1123 (Ind. Ct. App. 1982).

<sup>4</sup>*Id.* at 1129.



to the clerk [is] 'merely directory' and further, that it would be unreasonable to disallow payments made by an obligated father at the request of the mother."<sup>5</sup>

Because the factual circumstances of both *Castro* and *Payson* inherently appealed for an equitable exception, the court shrank from a doctrinaire application of the rule, observing that it is "contrary to the basic grain of American jurisprudence and perhaps arrogates to the judicial system an importance in the daily lives of ordinary people which we neither do, nor should, enjoy."<sup>6</sup> However, the court did not reject outright the no-credit rule; it merely refused its application to the facts at hand.<sup>7</sup> Consequently, the holdings in *Castro* and *Payson* stand for the proposition that courts may abandon the no-credit rule when the parties have entered into an ex parte agreement abrogating the official support order.

In *Olson v. Olson*,<sup>8</sup> decided subsequent to *Castro* and *Payson*, the second district of the court of appeals refused to offset a noncustodial parent's overpayments toward his general support obligation against arrearages on his court-ordered responsibility to assist with a minor child's education.<sup>9</sup> The court acknowledged that the purpose of providing regular and uninterrupted income for the child's benefit would not be contravened, but denied credit and declared that the overpayments constituted a "voluntary contribution."<sup>10</sup>

*Olson* reflects a prudent predilection to permit only narrow exceptions to the no-credit rule. That reluctance is born not only from the desire to ensure that the best interests of the children are protected, but also from the concomitant concern that some workable legal guidelines remain for support enforcement.<sup>11</sup> Practitioners consequently should continue to emphasize to clients that support should be rendered in the amount, manner, and at the times required by the court order and that any contemplated deviation from the terms of a court order should be

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<sup>5</sup>*Id.* at 1128 (citing *Manners v. State*, 210 Ind. 648, 652, 5 N.E.2d 300, 302 (1936)).

<sup>6</sup>436 N.E.2d at 367, *quoted in Payson*, 442 N.E.2d at 1128.

<sup>7</sup>Both decisions expressly reaffirmed the rule that credit should not be permitted for incidental support provided directly to children in the form of toys, clothing, or entertainment. While the *Castro* court also endorsed the holding in *Jahn v. Jahn*, 179 Ind. App. 368, 385 N.E.2d 488 (1979) that no credit should be granted for "actual" support provided by a noncustodial parent during the minor child's short visits, its analysis likewise buttresses the holding in *Franklin v. Franklin*, 169 Ind. App. 537, 349 N.E.2d 210 (1976) that credit should be granted for support provided during extended periods in which a minor child resides with the noncustodial parent.

<sup>8</sup>445 N.E.2d 1386 (Ind. Ct. App. 1983).

<sup>9</sup>*Id.* at 1389-90.

<sup>10</sup>*Id.* at 1390. The obligated parent's overpayments toward his general support obligation occurred when he continued to pay support for an emancipated child under a *divided* support order for several children. *Id.* at 1389.

<sup>11</sup>*See Whitman v. Whitman*, 405 N.E.2d 608, 613 (Ind. Ct. App. 1980) (jurisdictions allowing discretion to give credit for nonconforming payments have found it impossible to develop guidelines for the exercise of such discretion).

preceded by a formal modification of the order. In addition, documentary proof of nonconforming support should be compiled and maintained. Given the fact-sensitive nature of the issue, the question whether credit should be granted and the extent thereof will in many circumstances become an evidentiary question.<sup>12</sup>

2. *Emancipation*.—Absent a special finding by the court that a child is incapacitated or warrants support for educational needs, the duty to support a minor child either “ceases when the child reaches his twenty-first birthday”<sup>13</sup> or is terminated by the emancipation of the child.<sup>14</sup> The legal obligation to support the child ceases by operation of statutory law;<sup>15</sup> modification or termination of the duty to support the child who reaches 21 or is in fact emancipated is not necessary.<sup>16</sup>

The consequences of a failure to recognize the automatic termination of a support obligation were at issue in *Olson v. Olson*.<sup>17</sup> There, the father had been ordered to pay periodic support for each of his three minor children. He was also ordered to pay the children’s college expenses. While attending college, the oldest child reached age twenty-one; the father nonetheless continued to make the periodic payments toward the general support obligation of the oldest child, in addition to assuming the costs of his college education. In subsequent proceedings, the father sought credit against support arrearages for payments to his oldest son’s general support rendered subsequent to the son’s twenty-first birthday. The trial court denied credit.<sup>18</sup> On appeal, the court of appeals upheld the denial, ruling that “[u]nrequired payments made by a non-custodial parent for the benefit of children must be considered a gratuity or a voluntary contribution.”<sup>19</sup> At the same time, the court of appeals observed that because the order for support of the three minor children had not been formulated in gross, the obligated parent could have “justifiably ceased” the general support payments for the oldest child on his twenty-first birthday, although the

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<sup>12</sup>In his dissenting opinion in *Castro*, Judge Staton argued that credit for nonconforming support should not be granted absent documentary evidence that the claimed support had been provided. 436 N.E.2d at 369 (Staton, J., dissenting). The majority in *Castro* expressly rejected this approach, *id.* at 368, as did the court in *Payson*. 442 N.E.2d at 1129.

<sup>13</sup>IND. CODE § 31-1-11.5-12(d) (1982).

<sup>14</sup>*Id.* § 31-1-11.5-12(d)(1).

<sup>15</sup>*Ross v. Ross*, 397 N.E.2d 1066 (Ind. Ct. App. 1979).

<sup>16</sup>Two exceptions have been recognized. First, a parent who is obligated to pay an amount in gross for the support of several children may not reduce his support obligation pro rata to reflect a minor child’s emancipation or attainment of the age of majority. *Id.* at 1069-70. Second, the obligated parent who ceases support payments for a child on the basis of his emancipation risks the potential of a subsequent judicial determination that emancipation has not in fact occurred. Whether a child is emancipated often requires “the resolution of both legal and factual issues—a determination to be made by the trial court.” *Id.* at 1069 n.4.

<sup>17</sup>445 N.E.2d 1386 (Ind. Ct. App. 1983).

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1389.

general support order had been decreed to continue "until further order of Court."<sup>20</sup>

As the *Olson* court noted, the prudent approach is to seek a court order which terminates the general support obligation.<sup>21</sup> This is particularly true when the termination is premised on the child's emancipation, because emancipation determinations involve both factual and legal issues.<sup>22</sup>

In that regard, the court of appeals in *Green v. Green*<sup>23</sup> held that the marriage of a minor child is, as a matter of law, an emancipating event.<sup>24</sup> The minor child in that case had married but was separated from her spouse and in the process of obtaining a divorce. Seeking to perpetuate the support duty, the custodial parent attempted to introduce evidence that by virtue of the child's marital separation, she in fact remained dependent upon her parents for support. The trial court refused to admit the testimony and found the child emancipated. The court of appeals affirmed, stating:

[t]he salient failure of [emancipating] situations is [that] the child creates a new relationship between itself and its parent, relieving the parent from the responsibilities of support. Marriage of a minor child creates a similar relationship. Once married, a dependent spouse no longer looks to its parent for support but relies instead upon the other spouse for support.<sup>25</sup>

3. *Modifications of Support Orders and the Effective Date Thereof.*—Indiana has long held that modification or cancellation of an existing support order may only operate prospectively.<sup>26</sup> Retroactive modification of support has been rejected on the basis that once a support installment has accrued under a court's order, the court is without authority to annul or reduce the effect of its order.<sup>27</sup> The companion question of whether a modification order may be made effective as of the date a petition to modify is filed was addressed in *In re Marriage of Wiley*<sup>28</sup> and *Green v. Green*.<sup>29</sup> In opinions handed down the same day, the second and fourth districts of the court of appeals addressed this question of

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<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Ross v. Ross*, 397 N.E.2d 1066, 1069 n.4 (Ind. Ct. App. 1979); *see Isler v. Isler*, 422 N.E.2d 416, 419 (Ind. Ct. App. 1981).

<sup>23</sup>447 N.E.2d 605 (Ind. Ct. App. 1983).

<sup>24</sup>*Id.* at 609-10.

<sup>25</sup>*Id.* at 609 (citation omitted).

<sup>26</sup>*See, e.g., Abner v. Bruner*, 425 N.E.2d 716 (Ind. Ct. App. 1981); *Haycraft v. Haycraft*, 176 Ind. App. 211, 375 N.E.2d 252 (1978); *Kniffen v. Courtney*, 148 Ind. App. 358, 364, 266 N.E.2d 72, 76 (1971).

<sup>27</sup>*Jahn v. Jahn*, 179 Ind. App. 368, 370, 385 N.E.2d 488, 490 (1979).

<sup>28</sup>444 N.E.2d 315 (Ind. Ct. App. 1983).

<sup>29</sup>447 N.E.2d 605 (Ind. Ct. App. 1983).

first impression and adopted positions in irreconcilable conflict, thereby rendering the issue ripe for review by the Indiana Supreme Court.<sup>30</sup>

In *Wiley*, the trial court found a substantial and continuing change in the relative economic circumstances of the parties which warranted modification of the existing support order. The trial court ordered the modification effective as of the date of the hearing on the petition to modify. The second district reversed the trial court's determination that a modification was warranted and remanded the issue for redetermination,<sup>31</sup> but it affirmed the court's authority to order modification to relate back to the hearing date. Judge Shields explained:

Here Husband filed a petition to modify, signaling an apparent significant and continuing change in circumstances warranting a modification of the dissolution decree. *This fact differentiates this case from one where a trial court grants modifications for payments due and payable prior to the filing of the petition to modify.*<sup>32</sup>

To buttress its conclusion, the court observed that both the Uniform Marriage and Divorce Act and the majority of those jurisdictions which have considered the question permit the trial court to make a modification effective as of the date the petition is filed.<sup>33</sup>

In *Green*, the fourth district did not address the distinction drawn in *Wiley* between support installments which have accrued prior to the filing of a petition and those which come due thereafter. Rather, the court of appeals focused solely on the appellant's contention that, pursuant to *Bill v. Bill*,<sup>34</sup> the trial court had erred in failing to order the increase in support effective as of the date the petition was filed. *Bill* stands for the proposition that a provisional order of support entered in conjunction with a dissolution action may be made effective as of the date of the parties' separation.<sup>35</sup> The fourth district rejected the appellant's reliance on *Bill*, stating that

an interim award of support is often necessary to insure continued support for dependent minor children. . . .

A different factual setting is present when modification of

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<sup>30</sup>See IND. R. APP. P. 11(B)(2)(b), (c). Transfer was sought in *Green* but denied by the Indiana Supreme Court.

<sup>31</sup>444 N.E.2d at 320.

<sup>32</sup>*Id.* at 318 (emphasis added).

<sup>33</sup>*Id.* (citing UNIFORM MARRIAGE AND DIVORCE ACT § 316, 9A U.L.A. 183 (1979); *Trezevant v. Trezevant*, 403 A.2d 1134 (D.C. 1979); *Movius v. Movius*, 163 Mont. 463, 517 P.2d 884 (1974); *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962); Annot., 52 A.L.R.3d 156, 165 (1973); Annot., 6 A.L.R.2d 1277, 1328 (1949)).

<sup>34</sup>155 Ind. App. 65, 290 N.E.2d 749 (1972).

<sup>35</sup>*Id.* at 74-75, 290 N.E.2d at 754.

an existing support order is sought. When a parent is paying support pursuant to a valid order the status quo is maintained and there is no need to alter those payments until the court determines that a modification is necessary.<sup>36</sup>

The conflicting rulings in *Green* and *Wiley* need to be resolved judicially. *Green* should be overruled because it is not always true that simply because an existing support order is in effect, the status quo will be maintained. Discretion should be vested in the trial court to make a modification effective as of the time the petition was filed or any subsequent date.<sup>37</sup>

4. *Evidence—Clerk's Support Records.*—Whenever a court orders that child support payments be made via the clerk's office, the clerk is required to "maintain records listing the amount of such payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order."<sup>38</sup> However, *Payson* held that these records are not subject to judicial notice and must be admitted before they are subject to court consideration.<sup>39</sup> The court of appeals based its ruling on the fact that the record of support payments is not among those matters which the law compels the clerk to include within the pleadings, papers, and documents constituting the court's record of a particular cause.<sup>40</sup>

The court's reasoning is buttressed by sound pragmatic considerations. The prohibition against judicial notice of support records ensures that the mathematical computations necessary to determine a support arrearage will be subject to the scrutiny of both parties.<sup>41</sup> The examination of the support records, although mechanical, provides a catalyst for the adjudication of any claims that credit should be granted for nonconforming support or that the noncompliance is not the product of contemptuous behavior. Lastly, the admission of the support records provides a basis for intelligent appellate review of the trial court's determination.

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<sup>36</sup>447 N.E.2d at 608.

<sup>37</sup>The better practice for a party seeking such an effective date would be to plead and prove the specific time when the circumstances changed, thereby providing a basis for the court's exercise of discretion. See *Grundy v. Grundy*, 589 S.W.2d 776 (Tex. Civ. App. 1979).

<sup>38</sup>IND. CODE § 31-1-11.5-13(b) (Supp. 1983).

<sup>39</sup>442 N.E.2d at 1129-30. A custodial parent seeking to establish a support arrearage or basis for contempt should obtain a certified copy of the support records and tender it as evidence at the hearing. A certified copy of the clerk's support records is admissible pursuant to IND. CODE § 34-1-17-7 (1982).

<sup>40</sup>Neither IND. CODE § 31-1-11.5-13 (Supp. 1983) nor IND. R. TR. P. 77 specifically require the clerk to include the record of support payments into the case record. 442 N.E.2d at 1129-30. It is the inclusion of a document in the record of a case which renders it appropriate for judicial notice as a court record. *State v. Simpson*, 166 Ind. 211, 215, 76 N.E. 544, 545 (1906).

<sup>41</sup>See 442 N.E.2d at 1130 n.6.

5. *Enforcement and URESA.*—During the survey period, the General Assembly enacted two statutory amendments concerning the enforcement of support obligations. First, the legislature provided that upon application by the obligee of delinquent support payments, the court may award interest charges not exceeding one and one-half percent per month on the delinquent amount.<sup>42</sup> Enforcement of the interest award may be had in the same manner as is available for any other support obligation.<sup>43</sup>

The existence of a delinquency is a prerequisite to the award of interest; the statutory amendment does not authorize the trial court to award interest prospectively in contemplation of default.<sup>44</sup> Nor does the amendment mandate that interest be awarded once a delinquency is established. Rather, the issue is reserved to the discretion of the trial court.<sup>45</sup> While the statutory enactment is silent as to guidelines for the court's exercise of discretion, the experiences of other jurisdictions suggest that relevant factors should include whether the delinquency is the product of contemptuous behavior,<sup>46</sup> as well as other equitable considerations.<sup>47</sup> An award of interest bears obvious potential as a coercive measure in contempt proceedings.

The General Assembly's second enactment concerning child support removed discretion from the trial court in the context of enforcement proceedings initiated by the Title IV-D agency.<sup>48</sup> The act requires that when a particular amount of arrearage accumulates within a certain time frame, the court must order an assignment of wages if the IV-D agency requests it.<sup>49</sup> The assignment is then withheld "prior to all other assignments, orders of garnishment, and attachments."<sup>50</sup>

Whether seeking the implementation of the new mandatory proviso or the discretionary authority of the court, those pursuing the remedy

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<sup>42</sup>Act of Mar. 23, 1983, Pub. L. No. 280-1983, § 1, 1983 Ind. Acts 1762, 1763 (codified at IND. CODE § 31-1-11.5-12(e) (Supp. 1983)).

<sup>43</sup>IND. CODE § 31-1-11.5-12 (Supp. 1983).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*See, e.g.,* Myhre v. Myhre, 296 N.W.2d 905 (S.D. 1980).

<sup>47</sup>*See, e.g.,* McClure v. Dowell, 15 Utah 2d 324, 392 P.2d 624 (1964).

<sup>48</sup>Act of Apr. 18, 1983, Pub. L. No. 281-1983, §§ 1-2, 1983 Ind. Acts 1763, 1764-65 (codified at IND. CODE §§ 31-1-11.5-13, 31-6-6.1-16 (Supp. 1983) (former section concerns support due via the Dissolution of Marriage Act; latter governs support due via the Paternity Act)).

<sup>49</sup>The statute imposes this requirement when an obligor is

- (A) at least thirty (30) consecutive days in arrears;
- (B) in arrears in the amount of one (1) month's obligation within the last preceding two (2) months; or
- (C) in arrears in the amount of two (2) months' obligation within the last preceding six (6) months;

IND. CODE § 31-1-11.5-13(e)(2) (Supp. 1983). Only subsections (A) and (B) trigger the automatic wage assignment when the delinquency relates to a duty to support via the Paternity Act. IND. CODE § 31-6-6.1-16(e)(2) (Supp. 1983).

<sup>50</sup>*Id.* §§ 31-1-11.5-13(e)(2), 31-6-6.1-16(e)(2).

of a wage assignment should be cognizant of *Bowmar Instrument Corp. v. Maag*.<sup>51</sup> In that case, the noncustodial parent had been ordered to execute a wage assignment to satisfy arrearages on his support obligation. Ostensibly unaware that the employer was implementing the assignment, the custodial parent instituted contempt proceedings to enforce the court-ordered wage assignment. Following a hearing, the court ordered the corporation to comply with the assignment, found it was not in contempt, and denied its application for attorney fees. On appeal, the court of appeals reversed "because no personal jurisdiction of Bowmar was acquired in any of the proceedings leading up to the contempt citation."<sup>52</sup>

The reasoning behind the reversal appears confused. On the one hand, the court of appeals deemed inapplicable Trial Rule 71's requirement that "when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."<sup>53</sup> Thereafter, the court continued:

Here, although IC 31-1-11.5-13 grants the court authority to require an employer to accept a wage assignment, the separate and distinct interests of such an employer require that it be properly subjected to personal jurisdiction before the court may exercise its authority vis-a-vis the employer.

Since Bowmar was never served with process and the court had acquired no personal jurisdiction of it at the time of the contempt proceeding, it follows that Bowmar was not in contempt and the trial court lacked jurisdiction for the other orders it entered against Bowmar.<sup>54</sup>

Given the vagueness of its factual recitation and analysis,<sup>55</sup> two possible interpretations of this holding emerge. The decision could require that personal jurisdiction be obtained over an employer in conjunction with the proceedings in which the wage assignment is executed; likewise, it could require that jurisdiction be obtained at the time proceedings are instituted to enforce the wage assignment.<sup>56</sup> In short, *Bowmar* needs clarification.

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<sup>51</sup>442 N.E.2d 729 (Ind. Ct. App. 1982).

<sup>52</sup>*Id.* at 730.

<sup>53</sup>IND. R. TR. P. 71.

<sup>54</sup>442 N.E.2d at 731.

<sup>55</sup>It is unclear whether the reversal was warranted because of a lack of personal jurisdiction over Bowmar in the proceedings prior to the contempt action or in conjunction with the action itself.

<sup>56</sup>Ostensibly, the court's rejection of the application of Trial Rule 71 would suggest that the service of process and acquisition of personal jurisdiction should be accomplished at the time the wage assignment is executed—or at least prior to its implementation. Practically speaking, it is via the implementation of the assignment that a court exercises authority "vis-a-vis the employer." 442 N.E.2d at 731.

Applying the Uniform Reciprocal Enforcement of Support Act (URESA),<sup>57</sup> complementary decisions were rendered in *County of Ventura v. Neice*<sup>58</sup> and *D.L.M. v. V.E.M.*,<sup>59</sup> regarding the principles of full faith and credit and res judicata. In both instances, courts of other jurisdictions had entered judgments of paternity and concomitant orders of support, URESA actions subsequently were initiated in Indiana, and the respondents filed motions to dismiss the enforcement actions which were granted by the trial courts. On appeal, the trial court's dismissal in *Neice* was reversed; however, the court's dismissal in *D.L.M.* was affirmed.

In *Neice*, respondent's motion to dismiss was accompanied by an affidavit and memorandum which attacked the factual validity of the California court's determination of paternity.<sup>60</sup> He also argued that 1) the California court had lacked personal jurisdiction over him; 2) the statute of limitations had run; 3) enforcement of the judgment would be inequitable; and 4) the support order was modifiable and therefore not entitled to full faith and credit.<sup>61</sup> In response, the court of appeals emphasized that full faith and credit precludes a collateral attack on a foreign judgment except on jurisdiction over respondent.<sup>62</sup> The court rejected the second and third arguments as lacking in jurisdictional bases,<sup>63</sup> but agreed that the modifiable nature of the California support order took its enforcement outside the purview of the full faith and credit clause.<sup>64</sup> The principles of comity embodied in URESA, however, prompted the court to conclude that the support order entered in California was entitled to recognition and enforcement.<sup>65</sup>

*D.L.M.* provides an interesting comparison to *Neice*. There, petitioner originally sought reciprocal enforcement of the foreign judgment and support order in 1976. At that time, the Indiana trial court refused enforcement of the foreign judgment and order, finding that respondent had not fathered the subject child. Three years later petitioner filed a second URESA action, again seeking enforcement of the foreign paternity judgment and accompanying support order. Respondent invoked the defense of res judicata, arguing that the second enforcement action was barred by the trial court's 1976 determination that he was not the child's father. Upholding the trial court's dismissal of the second URESA action, the court of appeals held that the petitioner had waived any error in the trial court's 1976 failure to grant full faith and credit to the foreign paternity

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<sup>57</sup>IND. CODE §§ 31-2-1-1 to -39 (1982).

<sup>58</sup>434 N.E.2d 907 (Ind. Ct. App. 1982).

<sup>59</sup>438 N.E.2d 1023 (Ind. Ct. App. 1982).

<sup>60</sup>434 N.E.2d at 909. *Neice* maintained that it was factually impossible that he was the father of the child.

<sup>61</sup>*Id.* at 911.

<sup>62</sup>*Id.* at 910.

<sup>63</sup>*Id.* at 912-13.

<sup>64</sup>*Id.* at 913.

<sup>65</sup>*Id.*



judgment by failing to appeal that decision.<sup>66</sup> Noting that the trial court had jurisdiction in 1976, the court of appeals concluded that *res judicata* precluded petitioner from prosecuting her 1979 URESA action.<sup>67</sup>

In the wake of *Neice* and *D.L.M.*, practitioners should recognize that while a foreign determination of a duty to support is entitled to full faith and credit absent any jurisdictional defect, the failure to accord a judgment the constitutionally mandated effect is an error of law which does not render the URESA proceeding void, but merely voidable.<sup>68</sup> Just as a party seeking to invoke the full faith and credit doctrine has the burden of proving the existence of the prior foreign judgment,<sup>69</sup> so also does he have the burden of appealing an improper failure to apply the doctrine.

### B. Child Custody

Preeminent among survey-period developments in the law of child custody was the General Assembly's enactment of provisions permitting the award of joint custody to the divorced parents of minor children. Other notable developments involve the modification of a child custody order and the application of the Uniform Child Custody Jurisdiction Act.

1. *Joint Custody.*—In recent years, the concept of joint custody<sup>70</sup> has gained increasing acceptance as a potential alternative to the traditional notion that custody must be vested solely in one parent. A majority of jurisdictions now recognize in particular circumstances that the "best interests of the child" may be served through joint custody.<sup>71</sup>

In *Lord v. Lord*,<sup>72</sup> the court of appeals reversed a trial court's award of joint custody because the custody statute did not authorize an award of joint custody to competing parties.<sup>73</sup> Shortly thereafter, the legislature amended the Dissolution of Marriage Act to recognize joint custody and define those circumstances in which it may be appropriate.<sup>74</sup>

The statutory polestar for joint custody is the "best interests of the child."<sup>75</sup> Indiana's statute creates no presumption either for or against

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<sup>66</sup>438 N.E.2d at 1028.

<sup>67</sup>*Id.* at 1029.

<sup>68</sup>*Id.* at 1028.

<sup>69</sup>*Id.* at 1027.

<sup>70</sup>Joint custody should not be confused with split custody, whereby siblings are separated through custody by different persons, or divided custody, whereby each parent has physical custody of a child for extended periods of time. *In re Marriage of Ginsberg*, 425 N.E.2d 656, 657-58 n.1 (Ind. Ct. App. 1981) (citing Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979)).

<sup>71</sup>At least twenty-five states now recognize joint custody by legislative decree. See Schulman, "Who's Looking After the Children?" 5 FAMILY ADVOCATE (pt. 2), 31-35 (ABA 1982). Some states have recognized the remedy by judicial fiat. See, e.g., *Lumbra v. Lumbra*, 136 Vt. 529, 394 A.2d 1139 (1978).

<sup>72</sup>443 N.E.2d 847 (Ind. Ct. App. 1982).

<sup>73</sup>*Id.* at 849.

<sup>74</sup>Act of Apr. 18, 1983, Pub. L. No. 283-1983, § 1, 1983 Ind. Acts 1767, 1768 (codified at IND. CODE § 31-1-11.5-21 (Supp. 1983)).

<sup>75</sup>IND. CODE § 31-1-11.5-21 (Supp. 1983).

the award of joint custody. Rather, the legislature has dictated that the question is one which must be resolved on a case-by-case basis within the factual guidelines laid down in the statute.<sup>76</sup>

The definition which the legislature has accorded joint custody is also primary to the implementation of the statute. Joint custody does not denote equal physical custody of a child, but instead describes the right of the parents to share the authority and responsibility for “major decisions concerning the child’s upbringing, including the child’s education, health care, and religious training.”<sup>77</sup> The distinction must be clear in the minds of the parties, however, for their ability to obtain and utilize the statutory remedy is directly dependent upon their mutual understanding of the post-dissolution relationship.<sup>78</sup>

The legislature has declared the fitness and suitability of the prospective custodial persons relevant to joint custody.<sup>79</sup> For obvious reasons, however, the willingness and ability of the parents “to communicate and cooperate in advancing the child’s welfare”<sup>80</sup> has played a more crucial role in determining when joint custody is appropriate in other jurisdictions.<sup>81</sup> A general inability to communicate or cooperate often causes marriage dissolutions. The general relationship of the parties, however, is not at issue. Rather, the parties’ communication with respect to their child is what bears on their suitability for joint custody.<sup>82</sup> Where parents indicate an ability to unite in actions and decisions that advance their child’s welfare, joint custody may be appropriate. Where rancor or fundamentally distinct philosophies of child-rearing predominate, it is inappropriate.<sup>83</sup>

“[T]he wishes of the child and whether the child has established a close and beneficial relationship with both [parents]” are other statutory considerations.<sup>84</sup> The significance of a child’s preference will depend upon various factors, particularly his age. Ultimately, joint custody requirements are designed to ensure that the child recognizes both parents as “sources of security and love.”<sup>85</sup>

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<sup>76</sup>*Id.* § 31-1-11.5-21(g).

<sup>77</sup>*Id.* § 31-1-11.5-21(f).

<sup>78</sup>The ability to communicate and cooperate is one of the statutory factors which bears on the propriety of a joint custody award. *Id.* § 31-1-11.5-21(g)(2).

<sup>79</sup>*Id.* § 31-1-11.5-21(g)(1).

<sup>80</sup>*Id.* § 31-1-11.5-21(g)(2).

<sup>81</sup>*See, e.g.,* Wanser v. Wanser, 120 N.H. 436, 415 A.2d 881 (1980); Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978); *In re Marriage of Clement*, 52 Or. App. 101, 627 P.2d 1263 (1981).

<sup>82</sup>The statute indicates the parties’ ability to communicate and cooperate is significant only insofar as it concerns the advancement of the child’s welfare. IND. CODE § 31-1-11.5-21(g)(2) (Supp. 1983).

<sup>83</sup>*See, e.g.,* Beck v. Beck, 86 N.J. 480, 498-99, 432 A.2d 63, 72 (1981).

<sup>84</sup>IND. CODE § 31-1-11.5-21(g)(3) (Supp. 1983).

<sup>85</sup>*See* Beck v. Beck, 86 N.J. 480, 498, 432 A.2d 63, 71 (1981).

The geographic proximity of the parents represents the least subjective factor bearing on joint custody.<sup>86</sup> The ability to share physical custody and to cooperate and communicate effectively is affected by distance.<sup>87</sup> Equally as significant, close proximity provides the child with continuity of instruction in school and stability in his association with peers. This factor must have been especially important to the legislature, because any plans of a parent to change residence also figure into the court's assessment.<sup>88</sup>

The "nature of the physical and emotional environment in the home of each of the persons awarded joint custody" are also factors.<sup>89</sup> Stability and continuity should mark the life of the minor child, notwithstanding the dual homesteading which will probably accompany joint custody. To that end, markedly disparate lifestyles in the respective parents' homes may militate against an award of joint custody.

Finally, the General Assembly established that the parties' agreement to joint custody should be primary, but not determinative.<sup>90</sup> Even though the legislature has indicated that a joint custody award without an agreement would be dubious, joint custody should not be a vehicle of convenience or appeasement.<sup>91</sup> Indeed, circumstances justifying joint custody may only infrequently coalesce.

2. *Modification of Custody and the "Whole Environment" Approach.*—By statute, a child custody order may be modified "only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable."<sup>92</sup> In *Poret v. Martin*,<sup>93</sup> the Indiana Supreme Court ruled that the required change need not compel modification when viewed in isolation if the change warrants modification when examined in the context of the child's whole environment.<sup>94</sup>

In that case, the court determined that a review of circumstances existing at the prior custody determination was necessary to demonstrate the total effect of subsequent changes.<sup>95</sup> The court explained this approach as follows:

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<sup>86</sup>IND. CODE § 31-1-11.5-21(g)(4) (Supp. 1983).

<sup>87</sup>However, a significant distance between the prospective joint custodial parents should not necessarily defeat the award. See *Bazant v. Bazant*, 80 A.D.2d 310, 439 N.Y.S.2d 521 (1981).

<sup>88</sup>IND. CODE § 31-1-11.5-21(g)(4) (Supp. 1983). Ostensibly, the requirement of *Marshall v. Reeves*, 262 Ind. 107, 117, 311 N.E.2d 807, 813 (1974), that custodial parents who wish to move outside the state must obtain judicial sanction prior to the move would apply to both parents when joint custody is awarded.

<sup>89</sup>IND. CODE § 31-1-11.5-21(g)(5) (Supp. 1983).

<sup>90</sup>*Id.* § 31-1-11.5-21(g).

<sup>91</sup>The remedy should not be employed to dodge the difficult task of awarding sole custody to one of two competing parents nor to placate a parent's desire to extract his or her "share" of the marriage.

<sup>92</sup>IND. CODE § 31-1-11.5-22(d) (1982).

<sup>93</sup>434 N.E.2d 885 (Ind. 1982).

<sup>94</sup>*Id.* at 888.

<sup>95</sup>*Id.* at 888-89.

Although a change in a custody order must be necessitated by a substantial change in conditions since the order was made, it does not follow that there must be such a change that it compels the change in and of itself. The change, if its effect upon the child is to be properly assessed, must be judged in the context of the whole environment. It is, after all, the effect upon the child that renders the change substantial or inconsequential; and a change that might be regarded as slight or inconsequential in one case might be catastrophic in another.<sup>96</sup>

The significance of this whole environment approach lies in its consideration of “all circumstances, *including those previously weighed*, in order to determine, in context, the substance of the change giving rise to the review.”<sup>97</sup> On its face, this pronouncement may appear to contravene the statutory dictate that, in evaluating a modification petition, “the court shall not hear evidence on matters occurring prior to the last custody proceeding between the parties unless such matters relate to a change of circumstances.”<sup>98</sup> However, because the previously weighed matters are considered in the context of showing a change in the child’s environment, this approach does not subvert the *res judicata* principle behind the statute. This “whole environment” approach should not signal a departure from the statutory rule of evidence or the requirements for modification of a custody order; it only clarifies that courts must consider changes allegedly justifying modification in light of the child’s entire factual context. Two districts of the Indiana Court of Appeals have quoted the *Poret* “whole environment” approach in affirming modification orders.<sup>99</sup>

3. *Uniform Child Custody Jurisdiction Act*.—The law of interstate custody disputes continued to evolve during the survey period. Of particular consequence was the Indiana Court of Appeals’ decision in *In re Marriage of Hudson*,<sup>100</sup> where the fourth district confronted both jurisdictional and due process challenges to the trial court’s disposition of custody. The court of appeals examined the complex factual circumstances<sup>101</sup> and

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<sup>96</sup>*Id.* at 888.

<sup>97</sup>*Id.* (emphasis added).

<sup>98</sup>IND. CODE § 31-1-11.5-22(d) (1982).

<sup>99</sup>*Barnett v. Barnett*, 447 N.E.2d 1172, 1175 (Ind. Ct. App. 1983); *In re Marriage of Davis*, 441 N.E.2d 719, 722 (Ind. Ct. App. 1982).

<sup>100</sup>434 N.E.2d 107 (Ind. Ct. App. 1982).

<sup>101</sup>The parties had been married in Bloomington, Indiana, in 1975, and resided there for approximately one and one-half years. The husband was enlisted in the United States Navy and was transferred to Iceland, where the parties lived for two and one-half years. They then moved to the state of Washington for nine months. Thereafter, the wife and children moved to Bloomington for one and one-half months; then to Washington for four months; and finally returned to Bloomington where they resided at the time the wife filed her petition to dissolve the marriage. Meanwhile, the husband had been transferred to Spain;

concluded that neither Indiana nor any other jurisdiction enjoyed home state status over the parties' custody battle, the first test of jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>102</sup> Under the significant connection test, a corollary basis for jurisdiction under the UCCJA,<sup>103</sup> the trial court's jurisdiction was upheld because the parties had maintained marital residency in Indiana for one and one-half years, the current residence of the mother and children was in Indiana, and evidence of the past, present, and future residence of the children with their father in Spain was lacking. While the court of appeals recognized that Washington arguably also enjoyed subject matter jurisdiction by virtue of the parties' temporary stay in that state, the court noted that proceedings had not been instituted there and that, consequently, the question of competing jurisdictions was not at issue.<sup>104</sup>

The nonresident father also challenged the trial court's exercise of personal jurisdiction over him, alleging that it violated his due process rights. The court of appeals, in an extensive analysis of principles underlying the UCCJA and long-arm jurisdiction, held that a custody dispute "is in effect an adjudication of a child's status, which falls under the status exception of *Shaffer v. Heitner*."<sup>105</sup>

Unlike in *Hudson*, the question of competing jurisdictions was at issue in *In re Marriage of Cline*.<sup>106</sup> In that case, the parties had resided in Indiana during their marriage until final separation. When their marital relationship deteriorated, the wife returned to her parents' home in California, taking the parties' young child with her. Eight days later, the husband filed a petition for dissolution in the Dubois Circuit Court of Indiana and obtained an order awarding him custody of the child and enjoining the wife from interfering with his custody. The following day, he proceeded to California where authorities refused to enforce the order, prompting an incident which ultimately led to criminal charges against the husband. The husband returned to Indiana the following day. Two days later, the wife filed a petition for separation in a California court. Not until the following day did she receive a copy of the Dubois Circuit Court's restraining order. The wife then filed a motion to dismiss the Indiana proceedings. The Dubois Circuit Court held a hearing on the

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on the same day the dissolution petition was filed, the husband forcibly removed two of the parties' three children to Spain. *Id.* at 110.

<sup>102</sup>IND. CODE § 31-1-11.6-3(a)(1) (1982).

<sup>103</sup>*Id.* § 31-1-11.6-3(a)(2).

<sup>104</sup>434 N.E.2d at 117.

<sup>105</sup>*Id.* (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977)). Disposition of this issue is comprehensively analyzed in Garfield, *Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on In re Marriage of Hudson*, 16 IND. L. REV. 445 (1983). Professor Garfield characterizes the court's result as defensible under the UCCJA, *id.* at 448, but argues that a balance is needed between the child-oriented provisions of the UCCJA and the due process rights of the absent parent.

<sup>106</sup>433 N.E.2d 51 (Ind. Ct. App. 1982).

motion, communicated with the California court,<sup>107</sup> and declined to further exercise its jurisdiction. On appeal, the court of appeals found that the trial court had not abused its discretion in declining jurisdiction.<sup>108</sup>

The *Cline* ruling is an interesting one. Dubois Circuit Court had home state jurisdiction under the UCCJA because Indiana had been the child's residence "within six (6) months . . . of the proceeding and the child [was] absent from this state because of his removal or retention by a person claiming his custody."<sup>109</sup> Noting that the UCCJA was designed to limit—not expand—jurisdiction, the court of appeals upheld the abstention of the Dubois Circuit Court on the basis that California was the situs of the husband's alleged criminal behavior, that the wife was a battered spouse who had returned to her parents in California, that the husband had retained counsel in California,<sup>110</sup> and that medical records concerning the wife's alleged mental problems were available in California. Compared with the statutory forum non conveniens provisions of the UCCJA which emphasize the need for evidence concerning the child's best interests,<sup>111</sup> the factors present in *Cline* perhaps represent the outer limits of circumstances in which a trial court would be justified in refusing to exercise its jurisdiction. Tacit recognition of that conclusion lies in the court of appeals' acknowledgement that "if the California court determines that it is not an appropriate forum, we believe Indiana would have jurisdiction."<sup>112</sup>

Finally, the General Assembly amended section 23 of the UCCJA to provide substance to the international application of the Act.<sup>113</sup> Defined in the new statutory provisions are the international circumstances in which

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<sup>107</sup>The communication between California and Indiana represented a positive implementation of the interstate cooperation available under the UCCJA. See IND. CODE § 31-1-11.6-6(c) (1982).

<sup>108</sup>433 N.E.2d at 53.

<sup>109</sup>IND. CODE § 31-1-11.6-3(a)(1) (1982). Complementary considerations are contained in IND. CODE § 31-1-11.6-8 (1982), which governs the circumstances in which a court should decline to exercise jurisdiction. The statute provides that "[i]f the petitioner for an initial decree has wrongfully taken the child from another state," jurisdiction may be declined. In *Cline*, the husband argued that section 8 was relevant to the question of whether the DuBois Circuit Court had erred in declining jurisdiction. The court of appeals held that section inapplicable because the respondent, rather than the petitioner, of whom the statute speaks, removed the child. 433 N.E.2d at 53. A second and equally interesting aspect of the court of appeals' statutory analysis lies in its distinction between "unilateral" and "wrongful" removal as contemplated by the statute. *Id.* Absent an existing custody order, a parent's contemporaneous removal of a child and separation from a spouse would not be wrongful; however, section 8 specifically governs petitions for an initial decree, the very circumstance which the court ruled was outside the purview of the statute.

<sup>110</sup>This factor seems a querulous one, because the wife filed a motion to dismiss the Indiana proceedings and apparently had retained counsel here.

<sup>111</sup>See IND. CODE § 31-1-11.6-7(c) (1982).

<sup>112</sup>433 N.E.2d at 54.

<sup>113</sup>Act of Apr. 18, 1983, Pub. L. No. 284-1983, § 1, 1983 Ind. Acts 1774, 1775 (codified at IND. CODE § 31-1-11.6-23 (Supp. 1983)).

Indiana courts have jurisdiction to act, as well as the procedural steps which must be taken to invoke the jurisdiction of the court.<sup>114</sup>

### C. Visitation

The subject of grandparents' visitation rights dominated developments in the law of visitation. Also of consequence was the court of appeals' decision that the doctrine of parent-child immunity does not preclude a negligence action against a noncustodial parent for injuries sustained by a minor child during visitation.

1. *Grandparents' Visitation Rights.*—In *In re Visitation of J.O.*,<sup>115</sup> the court of appeals refused to expand the availability of court-ordered grandparent visitation beyond the specific circumstances outlined in the statute permitting such orders. The statute allows grandparents to seek visitation when the child's mother or father is deceased or the marriage of the child's parents has been dissolved.<sup>116</sup> In *J.O.*, summary judgment was entered against a grandmother who sought visitation with a grandchild born out of wedlock to the petitioner's daughter. The decision was upheld based on a strict interpretation of the statute's requirements: inasmuch as the natural parents had never been married, the marriage of the child's parents was obviously not dissolved.<sup>117</sup> The court stated that "[c]ourts are not the proper forum for all inter-family disputes and we shall not open the doors of the court to resolve such personal problems as do not come within the statute relied upon."<sup>118</sup> In virtually identical circumstances, the *J.O.* decision was invoked in *In re Meek*,<sup>119</sup> where the trial court's refusal to grant summary judgment against the petitioning grandmother was reversed.

Consistent with the court's strict interpretation of the grandparents' visitation statute, the legislature has clarified and further limited the circumstances in which judicial intervention is available.<sup>120</sup> The amendment restricts a grandparent from seeking visitation against his own son or daughter; rather, each may only invoke court intervention vis-a-vis a son-in-law, daughter-in-law, or third party.<sup>121</sup> For example, maternal grandparents may seek visitation rights if their daughter is dead or if her mar-

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<sup>114</sup>IND. CODE § 31-1-11.6-23 (Supp. 1983).

<sup>115</sup>441 N.E.2d 991 (Ind. Ct. App. 1982).

<sup>116</sup>IND. CODE § 31-1-11.7-2 (1982).

<sup>117</sup>441 N.E.2d at 995.

<sup>118</sup>*Id.*

<sup>119</sup>443 N.E.2d 890 (Ind. Ct. App. 1983).

<sup>120</sup>Act of Apr. 19, 1983, Pub. L. No. 285-1983, § 1, 1983 Ind. Acts 1776, 1776 (codified at IND. CODE § 31-1-11.7-2 (Supp. 1983)).

<sup>121</sup>IND. CODE § 31-1-11.7-2 (Supp. 1983). The third party vulnerability to suit is arguable. Where the child of the petitioning grandparent is dead, the statute remains silent as to who is subject to court order. Where the marriage is dissolved, the statute offers suit against the former in-law with legal custody of the child.

riage was dissolved and her former husband has legal custody<sup>122</sup> of the child.

2. *The Parent-Child Immunity Doctrine and the Noncustodial Parent.*—Among the more problematic decisions rendered during the survey period was the court of appeals' decision in *Buffalo v. Buffalo*.<sup>123</sup> The parties' marriage had been dissolved for approximately three years when, while visiting his father during a visitation period, the minor child was bitten by the father's dog, and as a result suffered severe and permanent injuries. As custodial parent, the mother filed suit against the father to recover medical expenses and loss of service.<sup>124</sup> The minor child also sued his father for personal injuries. The trial court dismissed their complaints.

On appeal, the child argued that the parent-child immunity doctrine was "obsolete and should be abrogated in its entirety."<sup>125</sup> The court refused to go so far, deciding the case on the first-impression question of whether the doctrine barred an action in negligence against a noncustodial parent. Distinguishing cases where the marital relationship remained intact, the fourth district unanimously rejected application of the doctrine:

The reasons underlying the parental immunity rule apply to [the mother] but cannot reasonably be said to apply to [the] father . . . .

Father points out he had a right of visitation with his child in this case. He argues it would be confusing at best and "discrimination" to permit suit against the non-custodial parent but keep the custodial parent immune therefrom.

We perceive no confusion arising from our decision. . . . There is no discrimination in the position we take today because visitation is not the equivalent of custody.<sup>126</sup>

The complete abrogation of parent-child immunity between the non-custodial parent and minor child runs against the legislature's trend to recognize that both parents can play an active role in a child's upbringing after dissolution.<sup>127</sup> When a minor child can sue his noncustodial parent, the law becomes a catalyst for hostilities which may ultimately prove adverse to the best interests of the child. While permitting the cause of action may serve the child's economic interests, allowing his testimony

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<sup>122</sup>The legislature's use of the term "legal custody," rather than the generic "custody," has significance. During the same legislative session, the General Assembly statutorily distinguished legal custody from physical custody in its joint custody provisions. See *supra* notes 70-91 and accompanying text.

<sup>123</sup>441 N.E.2d 711 (Ind. Ct. App. 1982).

<sup>124</sup>The support decree required the noncustodial father to pay the child's reasonable medical expenses. *Id.* at 712. The court did not explain whether the mother sought extraordinary medical expenses via her negligence action.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* at 713-14.

<sup>127</sup>See *supra* notes 70-91 and accompanying text.



against the noncustodial parent may cause severe and perhaps irreparable harm to that relationship.

In addition, the *Buffalo* ruling ignores the fact that noncustodial parents often enjoy extended periods of visitation where, as was recognized in *Lord v. Lord*,<sup>128</sup> "the non-custodial party must have some residual authority over discipline and health care when he or she has immediate physical control over the child."<sup>129</sup> Stripped of protection in the "bumps and bruises" world of children, the noncustodial parent will be vulnerable to vindictive, frivolous litigation, thus discouraging him from exercising visitation.

In short, the issue is not as simple as the *Buffalo* court would have it. The noncustodial parent's role in post-dissolution parenthood should be nurtured, not discouraged. The minor child's right to economic reimbursement by legal remedy should be balanced against the emotional best interests of the child. Litigation will likely be divisive and have lasting impact on the tripartite relationship.

#### D. Dissolution

1. *Statutory Procedural Developments—Provisional Counseling and Enforcement of Orders.*—The remedy of reconciliation through counseling was expanded by the General Assembly during the survey period. Effective September 1, 1983, a court may enter a provisional order requiring the parties to seek counseling "in an effort to improve conditions of their marriage."<sup>130</sup> Unlike the counseling the court may order at the final hearing, provisional counseling is available only upon a party's motion. In contemplating the provisional remedy, parties should not balk at the prospect of a lengthy delay because no time requirements are imposed on parties who implement the "one last try" legislation.<sup>131</sup>

The legislature also expanded the statutory provisions regarding the enforcement of orders entered pursuant to the Dissolution of Marriage Act, by providing that:

all orders and awards contained in the dissolution decree may be enforced by:

- (1) contempt;
- (2) assignment of wages; or
- (3) any other remedies available for the enforcement of a court order;

except as otherwise provided by this chapter.<sup>132</sup>

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<sup>128</sup>443 N.E.2d 847 (Ind. Ct. App. 1982).

<sup>129</sup>*Id.* at 849 n.1.

<sup>130</sup>Act of Mar. 23, 1983, Pub. L. No. 278-1983, § 1, 1983 Ind. Acts 1759, 1760 (codified at IND. CODE § 31-1-11.5-7(e) (Supp. 1983)).

<sup>131</sup>The provisional remedy of counseling is complementary to the sixty-day waiting period which the law imposes as a prophylactic against hasty and ill-considered dissolutions.

<sup>132</sup>Act of Mar. 23, 1983, Pub. L. No. 282-1983, § 1, 1983 Ind. Acts 1766, 1766 (codified

This amendment is in response to the Indiana Supreme Court's 1977 interpretation of a similar statutory provision in *State ex rel. Pritam Singh Shaunki v. Endsley*.<sup>133</sup> The court in *Endsley* held that the earlier statutory language<sup>134</sup> did not render money judgments enforceable via contempt.<sup>135</sup>

2. *Settlement Agreements*.—Several developments during the survey period concerned the extent to which a trial court should be bound by the terms of a settlement agreement.

In *Stockton v. Stockton*,<sup>136</sup> the first district of the court of appeals extensively analyzed the role the trial court may adopt when confronted with a property settlement agreement. Noting that the *Stockton* agreement lacked specificity and contained a judgment provision of questionable fairness, the appellate court concluded that the trial court had not abused its discretion by rejecting the parties' agreement. Judge Ratliff described the standard for rejection as follows:

The trial court should not reject a property settlement agreement arbitrarily or based upon whim or because the court believes it could write a better agreement. Unless the record demonstrates some unfairness, unreasonableness, manifest inequity in the terms of the agreement, or that the execution of the agreement was procured through fraud, misrepresentation, coercion, duress, or lack of full disclosure, the court should not second-guess the parties, particularly where both are represented by counsel.<sup>137</sup>

The limitation on the court's role envisaged in *Stockton* is reflected in *Hull v. Hull*.<sup>138</sup> There, the trial court had accepted a property settlement agreement which included a provision requiring the husband to maintain a country club membership for the wife and children. At the time of dissolution, the parties contemplated the continuance of their family membership; the country club subsequently informed them a family membership was not permitted after dissolution. The wife sought and was granted a court order requiring the husband to obtain an individual membership on her behalf. The husband appealed, arguing the original provision contained in the settlement agreement constituted an award of maintenance which, absent a finding of incapacity, was improper. The court of appeals agreed that the country club membership was a maintenance award; however, the court held that incapacity was not a prerequisite to an award of maintenance when the award is pursuant to a settlement agreement. The court explained that the statutory provisions

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at IND. CODE § 31-1-11.5-17(a) (Supp. 1983)).

<sup>133</sup>266 Ind. 267, 362 N.E.2d 153 (1977).

<sup>134</sup>IND. CODE § 31-1-11.5-17(a) (1982) (repealed 1983).

<sup>135</sup>266 Ind. at 269, 362 N.E.2d at 154.

<sup>136</sup>435 N.E.2d 586 (Ind. Ct. App. 1982).

<sup>137</sup>*Id.* at 589.

<sup>138</sup>436 N.E.2d 841 (Ind. Ct. App. 1982).

permitting agreements for maintenance "were not in any way limited to circumstances of financial or physical incapacity."<sup>139</sup>

The question of when an agreement in fact exists was considered in *Eddings v. Eddings*.<sup>140</sup> At the outset of the proceedings, the wife, while unrepresented by counsel, signed a document entitled "Agreement of Settlement" purporting to divide the marital estate. After retaining counsel, the wife repudiated the agreement both prior to and at the final hearing. The document was admitted at the final hearing and its provisions were merged and incorporated into the dissolution decree. The court of appeals summarily rejected the trial court's incorporation and merger of the "Agreement of Settlement." Relying on section 10 of the Dissolution of Marriage Act,<sup>141</sup> the court indicated that the agreement contemplated by the legislature must exist at the time the final hearing is held; until that moment, a party is free to reaffirm or renounce the agreement, even if consent has been previously indicated via written instrument.<sup>142</sup>

### *E. Property Division*

The disposition of marital property was the subject of numerous incremental developments during the survey period. Indiana courts confronted the weight to be accorded a homemaker's contribution in the distribution of property, the definition of property and the valuation thereof for division purposes, the prerequisites of a "just and proper" award, and fraud.

1. *The Homemaker's Contribution*.—In *Temple v. Temple*,<sup>143</sup> the court of appeals held that, pursuant to section 11 of the Dissolution of Marriage Act, a trial court should consider the homemaking efforts of both spouses in assessing the contribution of each to the acquisition of the marital property. The court found "no justification for limiting this factor exclusively to a non-wage earner, primary home-making spouse."<sup>144</sup> In reaching its conclusion that a spouse's homemaking and wage-earning efforts are both relevant, the second district expressly rejected the postulate of *In re Marriage of Patus*<sup>145</sup> that the legislature intended the homemaker contribution to be considered only where an unemployed spouse has acted solely as the primary homemaker of the marital household.<sup>146</sup>

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<sup>139</sup>*Id.* at 843.

<sup>140</sup>437 N.E.2d 493 (Ind. Ct. App. 1982).

<sup>141</sup>IND. CODE § 31-1-11.5-10 (1982).

<sup>142</sup>437 N.E.2d at 494 (citing *Anderson v. Anderson*, 399 N.E.2d 391 (Ind. Ct. App. 1979) (an agreement is not binding on the parties until approved by the trial court)).

<sup>143</sup>435 N.E.2d 259 (Ind. Ct. App. 1982).

<sup>144</sup>*Id.* at 262.

<sup>145</sup>175 Ind. App. 459, 372 N.E.2d 493 (1978).

<sup>146</sup>*Id.* at 461, 372 N.E.2d at 495.

The factors which the legislature has decreed relevant to the disposition of marital property are designed to determine the extent to which each party has contributed to the accumulation of property.<sup>147</sup> The legislature recognized that homemaking functions figure significantly in the economic circumstances of a marriage. *Patus* was grounded on a concern that where the spouses made relatively equal contributions to homemaking and wage earning, final hearings would involve volumes of self-serving testimony regarding “who washed dishes, who took out the trash, who painted the house, [etc.].”<sup>148</sup> This is a valid concern. However, as the court in *Temple* implicitly recognized, the existence or extent of homemaking contributions to the economic circumstances of a marriage does not vary according to its source. In short, *Patus* and *Temple* may not conflict. The myriad of factual circumstances in which the homemaker factor might arise will require case-by-case analysis and a common sense application of the statute.

2. *Property, Debts, and the Valuation Thereof*.—The survey period provided incremental developments in the definition of marital property,<sup>149</sup> and valuation of assets and debts continued to gain attention.<sup>150</sup>

3. *Property Awards*.—Indiana has long adhered to the rule that the division of marital assets is a matter vested in the sound discretion of the trial court.<sup>151</sup> The survey period saw the rule cited as an adjunct to the “Herculean task” of property division<sup>152</sup> and condemned as so imprecise as to be meaningless in most instances.<sup>153</sup> Indeed, the survey period continued to reflect an unwillingness to overturn property distributions which were challenged on the basis that the percentage of property

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<sup>147</sup>See IND. CODE § 31-1-11.5-11(b) (1982).

<sup>148</sup>175 Ind. App. at 462, 372 N.E.2d at 496.

<sup>149</sup>*Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990 (Ind. 1983) (group term life insurance policy void of cash surrender value and subject to continued employment is not subject to disposition); *McNevin v. McNevin*, 447 N.E.2d 611 (Ind. Ct. App. 1983) (opinion on rehearing) (vacating *McNevin v. McNevin*, 444 N.E.2d 320 (Ind. Ct. App. 1983)) (personal injury claim unliquidated at time of final separation is not marital property); *Sedwick v. Sedwick*, 446 N.E.2d 8 (Ind. Ct. App. 1983) (vested annuity structured for installment payments to the husband or his beneficiaries is marital property); *Goodyear v. Goodyear*, 441 N.E.2d 498 (Ind. Ct. App. 1982) (tax refund due to loss carryback deduction involving years when parties filed joint returns is not marital property because loss occurred after dissolution).

<sup>150</sup>*Salas v. Salas*, 447 N.E.2d 1176 (Ind. Ct. App. 1983) (property disposition struck down because trial court failed to consider indebtedness on parties' assets); *Dean v. Dean*, 439 N.E.2d 1378 (Ind. Ct. App. 1982) (trial court not required to attach a specific value to each marital asset prior to distribution); *Whaley v. Whaley*, 436 N.E.2d 816 (Ind. Ct. App. 1982) (trial court erred in failing to honor request to discount a judgment to present value).

<sup>151</sup>See, e.g., *Morphew v. Morphew*, 419 N.E.2d 770, 779 (Ind. Ct. App. 1981); *In re Marriage of Hirsch*, 179 Ind. App. 166, 170, 385 N.E.2d 193, 196 (Ind. Ct. App. 1979).

<sup>152</sup>*Temple v. Temple*, 435 N.E.2d 259, 262 (Ind. Ct. App. 1982).

<sup>153</sup>*Lord v. Lord*, 443 N.E.2d 847, 850-51 n.4 (Ind. Ct. App. 1982).

awarded to the respective parties was not supported by the evidence.<sup>154</sup> By the same token, property dispositions reflecting an improper assessment of assets or liabilities<sup>155</sup> or an unauthorized form of award<sup>156</sup> continued to receive dispositive treatment at the appellate level. In this latter respect, it was held in *Whaley v. Whaly*<sup>157</sup> that an award of \$137,200 cash payable in installments but conditioned upon the survivorship of the recipient spouse was an impermissible award of maintenance. The court of appeals held that absent an agreement between the parties, the award could not be conditioned on a subsequent change in circumstances.<sup>158</sup>

4. *Fraud*.—In *State ex rel. Smith v. Delaware Superior Court*,<sup>159</sup> the Indiana Supreme Court held that an action to set aside a property disposition due to fraud survives the death of a divorced party. The court rejected the contention that the action lay only in the probate proceedings of the deceased party, holding that section 17 of the Dissolution of Marriage Act constituted an exception to the general rule that divorce proceedings terminate with the death of either party.<sup>160</sup>

#### F. Paternity

Significant developments in the law of paternity occurred during the survey period.<sup>161</sup> The 1983 General Assembly amended section 8 of the Paternity Act to provide that if the state or a political subdivision initially pays for blood tests, those expenses are recoverable from an individual determined to be the biological father of the child.<sup>162</sup> The legislation is designed to recognize and accommodate the Department of Public Welfare's role in Title IV-D paternity actions. Pre-existing statutory authority had authorized trial courts to tax the expenses of blood tests as costs.<sup>163</sup> The legislature's action followed on the heels of the court of

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<sup>154</sup>See, e.g., *Lord v. Lord*, 443 N.E.2d 847 (Ind. Ct. App. 1982) (division of 77%—23% upheld); *Temple v. Temple*, 435 N.E.2d 259 (Ind. Ct. App. 1982) (69%—31% split upheld); see also *Dean v. Dean*, 439 N.E.2d 1378 (Ind. Ct. App. 1982).

<sup>155</sup>See *supra* note 150.

<sup>156</sup>*Whaley v. Whaley*, 436 N.E.2d 816 (Ind. Ct. App. 1982).

<sup>157</sup>436 N.E.2d 816 (Ind. Ct. App. 1982).

<sup>158</sup>*Id.* at 819-20.

<sup>159</sup>442 N.E.2d 978 (Ind. 1982).

<sup>160</sup>*Id.* at 980.

<sup>161</sup>In *In re M.D.H.*, 437 N.E.2d 119 (Ind. Ct. App. 1982), the Indiana Court of Appeals invoked the United States Supreme Court's analysis in *Mills v. Habluetzel*, 456 U.S. 91 (1982), and held that the two-year statute of limitations formerly applicable to paternity actions violated the equal protection clause of the United States Constitution. See IND. CODE § 31-4-1-26 (1976) (repealed 1979). *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982), discussed the right to counsel in paternity cases. For a discussion of the *Kennedy* case, see *Been & Donnell, Constitutional Law, 1983 Survey of Recent Development in Indiana Law*, 17 IND. L. REV. 79, 107 (1984).

<sup>162</sup>ACT OF APR. 15, 1983, PUB. L. NO. 291-1983, § 3, 1983 Ind. Acts 1796, 1797 (codified at IND. CODE § 31-6-6.1-8 (Supp. 1983)).

<sup>163</sup>IND. CODE § 31-6-6.1-8 (1982) (amended 1983).

appeals' conclusion in *Kennedy v. Wood*<sup>164</sup> that the then-existing statutory provisions for blood testing were constitutionally infirm.<sup>165</sup> This amendment allows the state to advance the expense of the tests which, in turn, could be taxed as costs to the parties once a determination is made, an approach which the United States Supreme Court has implicitly held constitutional.<sup>166</sup>

The statute was also amended to provide that "[t]he results of the tests, together with the finding of the expert, constitute conclusive evidence" if the defendant is excluded as the biological father.<sup>167</sup> Whatever the results and findings, however, they are admissible unless there is "good cause" to exclude them.<sup>168</sup> The statutory amendments reflect continuing confidence in the validity of blood testing.

### G. Termination of Parental Rights

Reverberations from the 1982 United States Supreme Court decision in *Santosky v. Kramer*<sup>169</sup> continued to sound during the survey period. In *Van Hoosier v. Grant County Department of Public Welfare*,<sup>170</sup> the court of appeals remanded a determination to terminate parental rights for further consideration under the *Santosky* clear and convincing standard of proof. The trial court's determination rendered prior to *Santosky* contained no indication that the invalid preponderance of the evidence standard embodied in Indiana's statutory scheme had not been utilized.<sup>171</sup> Meanwhile, in *In re V.M.S.*,<sup>172</sup> the court of appeals held that the statutory prerequisite to the termination of parental rights requiring proof of "a reasonable probability that the conditions that resulted in the child's removal will not be remedied"<sup>173</sup> does not violate *Santosky*. Distinguishing between procedural due process and substantive due process,<sup>174</sup> the court of appeals ruled that the reasonable probability the conditions would not be remedied must be established by clear and convincing evidence. After analyzing the evidence, the court concluded that the standard of proof had been satisfied.<sup>175</sup>

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<sup>164</sup>439 N.E.2d 1367 (Ind. Ct. App. 1982).

<sup>165</sup>*Id.* at 1373-74.

<sup>166</sup>*See* Little v. Streater, 452 U.S. 1, 16-17 (1981).

<sup>167</sup>IND. CODE § 31-6-6.1-8(a) (Supp. 1983).

<sup>168</sup>*Id.* The statute creates a rebuttable presumption that results are to be admitted; the burden rests on the objecting party to establish that the results should be excluded.

<sup>169</sup>455 U.S. 745 (1982).

<sup>170</sup>443 N.E.2d 350 (Ind. Ct. App. 1982).

<sup>171</sup>*Id.* at 351. The invalid preponderance of the evidence standard is contained in IND. CODE § 31-6-7-13(a) (1982). Notwithstanding *Santosky*, the statute was not amended by the 1983 General Assembly.

<sup>172</sup>446 N.E.2d 632 (Ind. Ct. App. 1983).

<sup>173</sup>IND. CODE § 31-6-5-4(1) (1982).

<sup>174</sup>446 N.E.2d at 636.

<sup>175</sup>*Id.* at 641.

The requirement of a reasonable probability that conditions will not be remedied was also the subject of *In re Wardship of B.C.*,<sup>176</sup> where a divided Indiana Supreme Court reversed the court of appeals' ruling that the prerequisite had not been established. B.C. was removed from her mother's custody because her mother was afflicted with schizophrenia. Following the termination of her parental rights, the mother argued on appeal that the treatment she was receiving and the lack of evidence concerning the potential alleviation of her mental illness warranted reversal of the termination. The court of appeals agreed.<sup>177</sup> Its decision, which was rendered eight days prior to *Santosky*,<sup>178</sup> invoked the constitutionally doomed preponderance of the evidence standard. Seven months after *Santosky*, the Indiana Supreme Court granted transfer.<sup>179</sup> Ironically, the court did not cite *Santosky* or define the standard of proof it was applying. Instead, the majority simply held that the court of appeals' evidentiary analysis was incorrect,<sup>180</sup> not acknowledging that the lower appellate court's opinion was predicated on a standard of proof lesser than was constitutionally required.

The applications of *Santosky* in *Van Hoosier v. Grant County Department of Public Welfare*, *In re V.M.S.*, and *In re Wardship of B.C.* are irreconcilable. As per *Van Hoosier*, the *Santosky* principle should have been applied retroactively in *B.C.*, for the case was still pending review<sup>181</sup> and had been decided by the trial court utilizing a constitutionally invalid standard of proof, a matter which lies at the very heart of the fact-finding process.

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<sup>176</sup>441 N.E.2d 208 (Ind. 1982).

<sup>177</sup>433 N.E.2d 19, 22 (Ind. Ct. App.), *rev'd*, 441 N.E.2d 208 (Ind. 1982).

<sup>178</sup>The court of appeals' decision in *B.C.* was handed down March 16, 1982, *id.* at 19; *Santosky* was decided March 24, 1982. 455 U.S. at 745.

<sup>179</sup>Transfer was granted and the case was decided on the same date; November 4, 1982. 441 N.E.2d at 208.

<sup>180</sup>*Id.* at 211-12. As part and parcel of its evidentiary analysis, the court relied on case precedent decided prior to *Santosky* which had employed the preponderance of the evidence standard.

<sup>181</sup>As explained in *Roberts v. Russell*, 392 U.S. 293 (1968), and *Linkletter v. Walker*, 381 U.S. 618 (1965), a judicial decision of constitutional import which bears on the validity of the fact-finding process should be applied retroactively to cases pending direct review. *Accord* *Enlow v. State*, 261 Ind. 348, 303 N.E.2d 658 (1973).

## VII. Evidence

J. ALEXANDER TANFORD\*

### A. Introduction

With rare exceptions,<sup>1</sup> Indiana evidence law progresses slowly and holds closely to the traditional concepts of the common law. This Survey Article collects the several important cases decided during the past year that continue this development of Indiana's common law of evidence.<sup>2</sup> A general word of caution is in order concerning the Indiana appellate courts' evidence cases. Most evidence issues arise in criminal cases, in which convicted defendants allege error in the admission of evidence against them or in the exclusion of evidence offered in their defense. A ruling in favor of the defendant could result in the reversal of the conviction and the release of the accused, something the courts seem loath to allow. Thus, many rulings on points of evidence, particularly those where the court disposes of the issue in a paragraph or two, should probably be interpreted as harmless error cases—cases in which the evidence against the defendant is so strong that the effect of the disputed evidence is negligible. Although the court does not treat these as harmless error cases, many seemingly contradictory opinions, upholding both trial courts that allow the state to introduce disputed evidence and those that prevent the defendant from introducing such evidence, can only be explained rationally in this way.<sup>3</sup>

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<sup>1</sup>See, e.g., *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975) (adopting unique rule that prior statements of witnesses available for cross-examination are not hearsay); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732 (1972) (overruling prior cases that excluded expert opinions embracing the ultimate issue); *Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210 (1972) (setting out which crimes are admissible for impeachment); *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979) (one of the first cases in the country to adopt the silent witness theory for admitting photographs as substantive evidence). See also IND. CODE § 34-3-5-1 (1982) (news reporter's privilege); IND. CODE § 35-37-4-4 (Supp. 1983) (shield law for rape victims).

<sup>2</sup>The reader may also wish to refer to the Survey Article on criminal law and procedure for comments on the legislature's attempt to enact a "good faith" exception to the constitutionally mandated exclusionary rule. Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 129 (1984). This development is not covered in this Article.

<sup>3</sup>Compare *Inman v. State*, 270 Ind. 130, 383 N.E.2d 820 (1978) (finding that objections to defendant's cross-examination question concerning prior inconsistent statement were properly sustained because the question called for conclusion), *cert. denied*, 444 U.S. 855 (1979) with *Cichos v. State*, 246 Ind. 680, 208 N.E.2d 685 (upholding proof of a prior inconsistent statement by State on grounds that anything inconsistent or contradictory casts



## B. Hearsay

1. *Continuing Development of the Patterson Rule.*—In the 1975 case of *Patterson v. State*,<sup>4</sup> the Indiana Supreme Court announced that the prior out-of-court statements of witnesses available for cross-examination were no longer to be considered hearsay. If a witness is present and available for cross-examination, then his or her prior statements are admissible for the truth of their contents. The prior statements need not be sworn or inconsistent with the witness' trial testimony.<sup>5</sup> Either litigant may take advantage of the *Patterson* rule. The cross-examiner may introduce prior inconsistent statements to impeach and contradict witnesses who testify against him.<sup>6</sup> However, a more litigated application of the *Patterson* rule has been the direct examiner's use of prior consistent statements to corroborate a witness' direct testimony. In the past year, Indiana courts have addressed three previously unsettled issues concerning the use of prior consistent statements as part of direct examination: (a) whether an available declarant must actually give direct testimony; (b) if so, how complete the testimony must be; and (c) if the witness-declarant does give extensive direct testimony, whether a cumulative prior statement that merely reiterates the direct testimony is admissible.

In *Lewis v. State*,<sup>7</sup> the Indiana Supreme Court settled the first of these issues—whether prior statements are admissible if the declarant is made available for cross-examination but is not actually called to testify. The court held that the central requirement for the admissibility of prior consistent statements is that the witness-declarant *must* give direct testimony about the events related in the statement.<sup>8</sup>

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doubt on witness's veracity), *reh'g denied*, 246 Ind. 680, 210 N.E.2d 363 (1965), *appeal dismissed*, 385 U.S. 76 (1966), *reh'g denied*, 385 U.S. 1020 (1967). Compare *Shelby v. State*, 428 N.E.2d 1241 (Ind. 1981) (defense witness prevented from stating opinion about defendant's state of mind) with *Porter v. State*, 271 Ind. 180, 391 N.E.2d 801 (1979) (prosecution witness allowed to give opinion on defendant's state of mind). Compare *Ingram v. State*, 426 N.E.2d 18 (Ind. 1981) (excluding defendant's cross-examination questions as beyond scope of direct) with *Doty v. State*, 422 N.E.2d 653 (Ind. 1981) (allowing state to ask questions that were arguably beyond scope of direct). See also *Carter v. State*, 412 N.E.2d 825, 830-31 (Ind. Ct. App. 1980) (concluding that seemingly inconsistent supreme court cases were really harmless error cases and that the supreme court had not intended to announce a change in an evidentiary rule).

<sup>4</sup>263 Ind. 55, 324 N.E.2d 482 (1975).

<sup>5</sup>*Cf.* FED. R. EVID. 801(d)(1)(A) (prior statement considered nonhearsay only if inconsistent and made under oath).

<sup>6</sup>This part of the rule has never presented any real problem in application. The only issue in this situation is whether the full foundation for prior inconsistent statements must be laid. See *Cichos v. State*, 246 Ind. 680, 208 N.E.2d 685 (requiring confrontation of witness with circumstances and details of prior inconsistent statement), *reh'g denied*, 246 Ind. 680, 210 N.E. 2d 363 (1965), *appeal dismissed*, 385 U.S. 76 (1966), *reh'g denied*, 385 U.S. 1020 (1967). This question has not been addressed by the Indiana Supreme Court. *Cf.* *D.H. v. J.H.*, 418 N.E.2d 286, 295 (Ind. Ct. App. 1981) (requiring confrontation).

<sup>7</sup>440 N.E.2d 1125 (Ind. 1982), *cert. denied*, 103 S. Ct. 1895 (1983).

<sup>8</sup>*Id.* at 1130.

[T]he key question in determining whether or not an abuse of the *Patterson* rule has occurred is whether the State has submitted evidence as to the relevant factual events in the case by directly examining (and thereby making him available for cross-examination) the witness-declarant about those facts. What we will not permit is for the State to put in substantive evidence of the witness-declarant's version of the facts solely through the admission of the witness' prior statement under the pretext of the *Patterson* rule. At some point the State must put the declarant of the prior statement on the witness stand and elicit direct testimony as to the facts at issue.<sup>9</sup>

In so holding, the court cited language from earlier cases stating that the *Patterson* rule was not intended to allow a party to use out-of-court statements as a substitute for available in-court testimony.<sup>10</sup> Although the court did not discuss any of the cases to the contrary, the opinion can be read as overruling *Dowdell v. State*<sup>11</sup> and *Little v. State*<sup>12</sup> sub silentio; cases in which prior statements were admitted despite the fact that the witness-declarants were not called to the witness stand.

A more difficult issue is the precise extent of direct testimony that must be elicited. Taken literally, *Lewis* seems to stand for the proposition that the witness must provide direct testimony as to all of the relevant events in order for his or her prior statements to be admissible. This is the interpretation given *Lewis* by the first district court of appeals in *B.M.P. v. State*.<sup>13</sup> In *B.M.P.*, the State introduced the declarant's prior statement under the *Patterson* rule before the declarant was called as a witness. Later in the trial, the State called the declarant, who testified to some general matters but refused to testify about the robbery in issue. The defendant did not claim any fifth amendment privilege; he simply refused to testify. He was found guilty of contempt and returned to prison. The court of appeals relied on the literal language of *Lewis* and held that if a declarant refused to testify about relevant facts, whether or not on

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<sup>9</sup>*Id.*

<sup>10</sup>The court cited *Stone v. State*, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978) ("the use of prior statements . . . by the proponent of the witness in lieu of available and direct testimony . . . will no longer be sanctioned"); *Samuels v. State*, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978) (using out-of-court statements "as a mere substitute for available in-court testimony" is a misapplication of *Patterson* rule); *Flewallen v. State*, 267 Ind. 90, 98, 368 N.E.2d 239, 243 (1977) (DeBruler, J., dissenting) (rule should not permit the state to prove its case solely through the use of prior statements, without even attempting to elicit the live testimony of sworn witnesses). See also C. MCCORMICK, *HANDBOOK ON THE LAW OF EVIDENCE* § 251, at 601, 603 (2d ed. 1972) (offering statement in lieu of live testimony, merely tendering the witness for cross-examination, seen as serious danger).

<sup>11</sup>429 N.E.2d 1 (Ind. Ct. App. 1981), criticized in Karlson, *Evidence*, 1982 *Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 191-93 (1982).

<sup>12</sup>413 N.E. 2d 239 (Ind. Ct. App. 1980).

<sup>13</sup>446 N.E.2d 17 (Ind. Ct. App. 1983).

fifth amendment grounds, his prior statements could not be admitted because there had been no direct testimony about the facts in issue.<sup>14</sup>

It is doubtful that this is the result intended by the Indiana Supreme Court. To reach this result, the court of appeals had to surmise that *Lewis* overruled, or at least weakened, another supreme court decision, *Rapier v. State*,<sup>15</sup> decided only five months earlier. In *Rapier*, a state's witness gave some direct testimony but refused to testify about the event itself, asserting an invalid fifth amendment privilege. The State then offered in-to evidence the witness' prior statement about the robbery in question. Despite the fact that the refusal to testify made cross-examination practically impossible, the supreme court held the statement admissible under *Patterson*.<sup>16</sup> The position taken by the court in *Rapier* was consistent with a series of cases in which the prior statements of witnesses had been found admissible despite the fact that adequate cross-examination of the declarants had been difficult or impossible because they claimed a lack of memory,<sup>17</sup> lack of personal knowledge,<sup>18</sup> or the fifth amendment privilege.<sup>19</sup> A few months later when it decided *Lewis*, the court gave no indication that it intended to retreat from this holding.

*Rapier* and *Lewis* can be reconciled, however, and some guidance can be derived for determining when a prior statement may be used as a substitute for direct examination. The basic foundation requirement stated in *Lewis* is that the offering party must first call the declarant as a witness and attempt to elicit the relevant facts through direct examination.<sup>20</sup> No prior statements are admissible until after this attempt has been made. However, pursuant to *Rapier*, if the witness refuses to testify or claims a lack of memory, the prior statement is admissible despite the difficulty in cross-examining the witness. The *Patterson* rule only prohibits the use of out-of-court statements in lieu of *available* direct testimony,<sup>21</sup> and if a witness refuses to testify, his or her direct testimony becomes unavailable.

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<sup>14</sup>*Id.* at 20.

<sup>15</sup>435 N.E.2d 31, 33-35 (Ind. 1982). The court in *B.M.P.* stated that "*Lewis* appears to be a retreat from the position stated in *Rapier*." 446 N.E.2d at 20.

<sup>16</sup>435 N.E.2d at 35.

<sup>17</sup>See *Lowery v. State*, 434 N.E.2d 868, 870 (Ind. 1982); *Arch v. State*, 269 Ind. 450, 454, 381 N.E.2d 465, 468 (1978).

<sup>18</sup>See *Balfour v. State*, 427 N.E.2d 1091 (Ind. 1981).

<sup>19</sup>See *Torrence v. State*, 263 Ind. 202, 205, 328 N.E.2d 214, 216 (1975). *But see* *Taggart v. State*, 269 Ind. 667, 671, 382 N.E.2d 916, 919 (1978) (DeBruler, J., concurring) (arguing that successfully asserting fifth amendment prevents cross-examination and makes prior statements inadmissible hearsay). Interestingly, DeBruler also wrote the majority opinion in *Torrence*.

<sup>20</sup>*But cf.* *Remsen v. State*, 428 N.E.2d 241 (Ind. 1981) (holding that it is permissible to introduce the statement first and call the witness-declarant later for full examination).

<sup>21</sup>In *Patterson*, the court emphasized that "the *availability* of the declarant for cross-examination is required. It is our judgment that this safe-guard is of paramount importance . . . ." 263 Ind. at 58, 324 N.E.2d at 485 (emphasis added).

The Indiana Supreme Court's approach is troublesome. As long as the witness-declarant testifies and can be cross-examined fully about both the veracity of the prior statement and the credibility of his or her underlying observations, application of the *Patterson* rule is clearly correct because none of the usual hearsay dangers are present. However, when statements are admitted in the absence of an adequate opportunity to cross-examine the declarant because he or she refuses to testify or is unable to recall the events, then the hearsay dangers return. The opponent cannot interrogate the declarant and challenge the veracity of the statement if the declarant will not or cannot discuss it in court. To call such a statement admissible nonhearsay under the *Patterson* rule is to change the basic concept of hearsay: that an inability to test the veracity of the declarant requires that a statement be excluded unless it falls within an established exception to the hearsay rule.<sup>22</sup> Moreover, the *Patterson* rule is premised on having an available witness-declarant and when a witness-declarant cannot remember the facts or refuses to testify about them, the witness is unavailable for all practical purposes.

An analysis more true to the hearsay rule would be the approach suggested by Justices DeBruler and Prentice and by the first district court of appeals in *B.M.P.*: if the declarant cannot be cross-examined effectively, his or her prior statements do not fall within the *Patterson* rule, and should be considered hearsay.<sup>23</sup> This does not mean that the statements necessarily are inadmissible. The modern trend is to recognize that inability to remember or refusal to testify constitutes unavailability for purposes of the hearsay exceptions for declarations against interest and former testimony.<sup>24</sup> If the proponent can lay the foundation for either exception, the statement would be admissible. This approach would better assure that unreliable hearsay is excluded and that reliable statements are admitted by requiring either that the declarant be subject to cross-examination or that the statement meet the reliability criteria of the traditional hearsay exceptions.<sup>25</sup>

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<sup>22</sup>In *Patterson*, the court stated: "[T]he primary reason for excluding hearsay is because of its insusceptibility to the test of cross-examination." 263 Ind. at 57, 324 N.E.2d at 484 (citation omitted). See C. McCORMICK, *supra* note 10, § 245, at 583-84; M. SEIDMAN, *The Law of Evidence in Indiana* 113-15 (1977); J. TANFORD & R. QUINLAN, *INDIANA TRIAL EVIDENCE MANUAL* § 16.1 (1982).

<sup>23</sup>*Taggart v. State*, 269 Ind. 667, 671-72, 382 N.E.2d 916, 919 (1978) (DeBruler, J. and Prentice, J., concurring); *B.M.P. v. State*, 446 N.E.2d 17, 20 (Ind. Ct. App. 1983).

<sup>24</sup>See FED. R. EVID. 804(a)(1)-(3); see also C. McCORMICK, *supra* note 10, § 253 at 611-12.

<sup>25</sup>Many statements about which a declarant will refuse to testify, or will develop sudden "amnesia," will be statements against his or her penal interest. Although the Indiana Supreme Court has explicitly refused to recognize declarations against penal interest as a hearsay exception, *Taggart v. State*, 269 Ind. 667, 382 N.E.2d 916 (1978), many jurisdictions now allow such statements into evidence. See, e.g., FED. R. EVID. 804(b)(3). The Indiana Supreme Court's concern that an accused would present perjured third-party confessions under this exception probably is an exaggerated fear. First, such statements currently

At the opposite end of the spectrum is the situation in which a witness-declarant provides full and complete testimony on direct examination, showing a clear memory of the events, and the examiner seeks to introduce his or her prior statements that reiterate the direct but raise no new matters. Such cumulative evidence should be excluded on relevancy grounds as any purely repetitious testimony would be.<sup>26</sup> This objection was raised in *Lewis* but rejected by the supreme court, although that opinion disposes of this issue with no real discussion:

. . . . .

Appellant claims the trial court erred in admitting over his objection hearsay testimony. This testimony was elicited from [three] State's witnesses . . . [who] testified as to statements made to them by [the victim] both before and after the offense was committed. The subject matter of these statements had already been addressed by [the victim] in the direct and cross-examination.

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Appellant now concludes . . . that abuse of the *Patterson* rule

are admissible under *Patterson* if the defendant calls that third party as a witness, even if he or she asserts the fifth amendment. See *Torrence v. State*, 263 Ind. 202, 205, 328 N.E.2d 214, 216 (1975). Second, a penal interest exception could be modeled after the Federal Rules of Evidence, which require that a third-party confession offered to exculpate the defendant is only admissible if "corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3). See also 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1477, at 358 (Chadbourn rev. 1974). Wigmore states that the fear of perjury

is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence . . . . This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.

The only practical consequences of [excluding declarations against penal interest] are shocking to the sense of justice; for in its commonest application it requires . . . the rejection of a confession, however well authenticated, of a person . . . who has avowed himself to be the true culprit.

*Id.* at 358-59. Third, it has been suggested that restricting a defendant's ability to prove reliable third-party confessions violates his or her sixth amendment right to present exculpatory evidence. See Tague, *Perils of Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981). Adoption of the penal interest exception by Indiana would not greatly affect ultimate admissibility, but would bring a measure of rationality to this area.

<sup>26</sup>See, e.g., *Palmer v. State*, 153 Ind. App. 648, 288 N.E.2d 739 (1972) (proper for trial court to prevent witness from repeating testimony already covered once); *Hawkins v. State*, 219 Ind. 116, 37 N.E.2d 79 (1941) (within court's discretion to stop repetitious questioning). See generally T. SMITH, TRIAL HANDBOOK FOR INDIANA LAWYERS § 231, at 181-82 (1982); J. TANFORD & R. QUINLAN, *supra* note 22, §§ 3.1 - 3.4, at 5-6; Brasswell, *Objections—Howls of a Dog Pound Quarrel*, 4 CAMPBELL L. REV. 339, 357-58 (1982); Denbeaux & Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 486-87 (1979); Karlson, *supra* note 11, at 193-94.

occurs when it is used to . . . permit a *retelling* of her story through the admission of other witness testimony as to her prior statements concerning the facts at issue.

Appellant is not correct . . . .

We hold there was not improper application of the *Patterson* rule here. . . . [T]he *Patterson* rule was not used to admit substantive evidence “*in lieu of* available and direct testimony . . . .”<sup>27</sup>

Earlier *Patterson* rule cases had contained language strongly suggesting that purely cumulative prior statements, although not hearsay, might be excludable.<sup>28</sup> Unfortunately, the supreme court has never given an explicit answer to this question. Although *Lewis* appears to permit purely cumulative statements, the language used by the court is hardly definite enough to say that the matter is settled. Indeed, in light of the fact that the cases prior to *Lewis* seemed to imply the opposite result, it is not at all clear that the court in *Lewis* intended to open the door to the repetitious use of prior statements.<sup>29</sup> On this point, *Lewis* probably should be read as a harmless error case.<sup>30</sup>

2. *Tacit Admissions*.—It has long been the rule that the failure to deny an accusation can constitute a tacit admission that the accusation is true. The proponent of a tacit admission must demonstrate that the accusation was made in the presence of the accused person, that the accused heard and understood the accusation and had a realistic opportunity to deny it, and that the statement would ordinarily be denied by an innocent person. If this foundation is laid, then anything other than a clear denial may be allowed as evidence that the accused tacitly acknowledged the truth of the accusation.<sup>31</sup> Before 1982, tacit admissions were only ad-

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<sup>27</sup>440 N.E.2d at 1129-30 (quoting *Stone v. State*, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978) (emphasis added)).

<sup>28</sup>See, *Norton v. State*, 408 N.E.2d 514, 522-23 (Ind. 1980) (consistent statement introduced on redirect was relevant for clarification after testimony became confused on cross-examination); *Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239 (1977) (statements were consistent with testimony but were relevant because more detailed and more incriminating); *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975) (statement was more incriminating and more revealing than testimony). But see *Underhill v. State*, 428 N.E.2d 759, 765-66 (Ind. 1981) (refusing to reverse because contents of statement “merely reiterated” the direct testimony; probably a harmless error case); *Buttram v. State*, 269 Ind. 598, 382 N.E.2d 166 (1978) (permitting other witnesses to repeat statements by victim; no discussion).

<sup>29</sup>The policy argument against allowing cumulative prior statements is simple. Because the rules of evidence generally will not permit a witness to tell his or her story once and then simply to start over at the beginning and tell it again, a few witnesses should not be allowed to do exactly the same thing merely because they happen to have made prior statements. The consequences might be that eventually, every attorney may have his or her witnesses prepare written statements before trial so they could “testify” twice.

<sup>30</sup>See *supra* text accompanying note 3.

<sup>31</sup>See generally C. McCORMICK, *supra* note 10, § 270, at 651-55. But cf. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 GA. L. REV. 27 (1979).

missible when the accused person was a party-opponent so that the implied statement fell within the hearsay exception for admissions by the opposing party.<sup>32</sup> In *Moredock v. State*,<sup>33</sup> the Indiana Supreme Court combined the concept of tacit admissions with the *Patterson* rule to create a new rule of evidence: the prior tacit admissions of nonparty witnesses who are present and available for cross-examination are admissible nonhearsay to the same extent as their other prior statements. Moredock was convicted of rape and based his application for a new trial on newly discovered evidence, including evidence that the victim tacitly admitted that no rape occurred.<sup>34</sup> The supreme court remanded the case for a new trial, holding that the victim's tacit admission could "properly be considered by the jury as substantive evidence" on retrial.<sup>35</sup>

*Moredock* is a new extension of Indiana's unique hearsay rule which has developed since *Patterson*. Tacit admissions of parties traditionally have been admissible because the party-"declarant" is usually present and can explain why he or she failed to deny the accusation.<sup>36</sup> The extension of the *Patterson* rule to tacit admissions in *Moredock* still ensures that the accused person will be present at trial to explain any mitigating circumstances or misunderstandings surrounding a tacit admission. Under the *Patterson* rule only the prior statements of witnesses who are available for cross-examination are admissible non-hearsay. Therefore, under *Moredock*, only the tacit admissions of *available* non-party witnesses will be allowed. It is unlikely that this doctrine will be extended to other kinds of admissible hearsay because the absence of a declarant makes it impossible to verify that he or she truly heard, understood, and acquiesced in another's assertion of wrongdoing.<sup>37</sup>

3. *Business Records*.—Under the business records exception to the hearsay rule, a foundation for the admission of business records is laid by calling a witness to authenticate them. Indiana courts traditionally have

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<sup>32</sup>See J. TANFORD & R. QUINLAN, *supra* note 22, § 17.5, at 86-87, and cases cited therein. For example, in *Robinson v. State*, 262 Ind. 463, 317 N.E.2d 850 (1974), a witness testified that he heard the defendant's mother say, "You shouldn't have thrown the baby against the wall," and the defendant respond, "Shut up." *Id.* at 465, 317 N.E.2d at 852.

<sup>33</sup>441 N.E.2d 1372 (Ind. 1982).

<sup>34</sup>The opinion does not indicate the exact nature of the accusation, the nature of the victim's response, or the circumstances, other than that the witness who allegedly heard the tacit admission went to see the victim immediately after the incident. The court's discussion of the effect of an equivocal response and the absence of a clear denial, *id.* at 1374, indicates that the victim may have failed to deny the witness' assertion that the rape charge was fabricated to force the victim's boyfriend to move out.

<sup>35</sup>*Id.*

<sup>36</sup>See M. SEIDMAN, *supra* note 22, at 118-23; J. TANFORD & R. QUINLAN, *supra* note 22, §§ 17.1, 17.5, at 85, 85-86.

<sup>37</sup>See generally C. MCCORMICK, *supra* note 10, § 270, at 652 (courts receive tacit admissions with caution because it is easy to manufacture this kind of evidence, and it may be extremely damaging to the defendant).



required that either the person who made the entry or the entrant's direct supervisor identify the document.<sup>38</sup> Although Indiana courts reiterated this rule in two decisions during the survey period,<sup>39</sup> the supreme court's decision in *Pitts v. State*<sup>40</sup> appears to contravene these long-established requirements for laying a proper business record foundation.

In *Pitts*, the supreme court affirmed the trial court's admission of fingerprint cards prepared by various state prison officials<sup>41</sup> after authentication by a federal agent, an FBI fingerprint specialist, as business records of the FBI.<sup>42</sup> The supreme court conceded that the authenticating witness was not the actual entrant; therefore, the only other accepted method of laying a business records foundation was to call someone under whose supervision the entries were made. The witness called in *Pitts*, however, was not the supervisor of the state officials who prepared the entry. As far as the trial record shows, he was not even a supervisor of the FBI. Nor were the state prison officials who made the entries employees or agents of the FBI.

At first glance *Pitts* appears to represent a major shift in Indiana law regarding the admissibility of business records, overruling the series of recent cases requiring that the entrant or his supervisor identify the records<sup>43</sup> and that the entries be prepared by an employee of the business that maintains the record.<sup>44</sup> It is highly unlikely, however, that the supreme

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<sup>38</sup>See J. TANFORD & R. QUINLAN, *supra* note 22, § 19.3, at 95-96.

<sup>39</sup>*Darnell v. State*, 435 N.E.2d 250, 253 (Ind. 1982) (person in charge of record keeping may authenticate business records prepared by other employees); *Hebel v. Conrail, Inc.*, 444 N.E.2d 870, 877-78 (Ind. Ct. App. 1983) ("custodian of business records may identify them at trial"; "person making the record must be under direct supervision and control of the supervisor identifying the documents"). The basic rule is repeated in the text only because some confusion seems to exist in the secondary literature over who can be called as the authenticating witness. See M. SEIDMAN, *supra* note 22, at 135 (records may be authenticated by any witness having knowledge of the recordkeeping process; no citations).

<sup>40</sup>439 N.E.2d 1140 (Ind. 1982).

<sup>41</sup>The opinion does not state where the fingerprint cards originated. This information was obtained from R. Robinson, the defense attorney, by telephone on June 8, 1983.

<sup>42</sup>439 N.E.2d at 1142.

<sup>43</sup>See *Morris v. State*, 406 N.E.2d 1187 (Ind. 1980); *Brandon v. State*, 396 N.E.2d 365 (Ind. 1979); *Crosson v. State*, 268 Ind. 511, 376 N.E.2d 1136 (1978); *Jones v. State*, 267 Ind. 205, 369 N.E.2d 418 (1977); *Burger Man, Inc. v. Jordan Paper Prod., Inc.*, 170 Ind. App. 295, 352 N.E.2d 821 (1976); *American United Life Ins. Co. v. Peffley*, 158 Ind. App. 29, 301 N.E.2d 651 (1973). But cf. *Myers v. State*, 422 N.E.2d 745 (Ind. Ct. App. 1981) (identifying witness was not supervisor). While many of these cases require the supervisor under whose direction the records are "kept," this phrase means more than mere mechanical storage of records. The very heart of the business records exception is that documents must be records both prepared and maintained by a business in the course of regularly conducted activities. See C. MCCORMICK, *supra* note 10, § 310, at 725-27.

<sup>44</sup>*Morris v. State*, 406 N.E.2d 1187 (Ind. 1980); *Brandon v. State*, 396 N.E.2d 365 (Ind. 1979); *Crosson v. State*, 268 Ind. 511, 376 N.E.2d 1136 (1978); *Jones v. State*, 267 Ind. 205, 369 N.E.2d 418 (1977); *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970); *American United Life Ins. Co. v. Peffley*, 158 Ind. App. 29, 301 N.E.2d 651 (1973). Many



court intended to allow records prepared by one business to be admissible as the business records of a different business. From the perfunctory opinion in *Pitts*, it appears that this issue was not raised by the defense attorney, and that the supreme court only intended to dispose of the meritless argument that the records should be excluded because their sponsor lacked personal knowledge. Although the result sanctioned is incompatible with prior law, it is doubtful that the supreme court intended a major change away from the common law in a sparse opinion which is nearly devoid of discussion and that cites only one prior case.<sup>45</sup>

4. *Excited Utterances*.—To qualify under the excited utterance exception to the hearsay rule, a declaration must be made in spontaneous response to a startling event. The event must be exciting enough to overcome the reflective faculties of the declarant, and the statement must be made sufficiently contemporaneous with the event, before the excitement wears off, so that there is not time for calm reflection.<sup>46</sup> No fixed time limit has been set by the courts, but the more time that has elapsed between the event and the making of the statement, the less likely it is to qualify as an excited utterance. Prior Indiana decisions have uniformly held that statements made more than a few minutes after a startling event do not qualify.<sup>47</sup> Indeed, the longest interval allowed before 1982 was fifteen minutes.<sup>48</sup>

During the survey period, however, this time limit was extended significantly. In *Gye v. State*,<sup>49</sup> the supreme court affirmed the trial court's admission of a statement as an excited utterance when the statement was made approximately forty-five minutes after the startling event. In this case, the person making the statement was the victim of a stabbing. The victim stopped a car soon after she was attacked and was driven to the hospital. The trip took about forty minutes. At the hospital, the emergency

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of these cases state that the entrant must have a duty to record information. This phrase does not mean just any duty, but a business duty owed by an employee to his or her employer. See *C. McCORMICK*, *supra* note 10, § 310, at 726-27.

<sup>45</sup>See *supra* text accompanying note 3.

<sup>46</sup>*J. TANFORD & R. QUINLAN*, *supra* note 22, § 28.3, at 135-36. Additional foundation requirements include: (1) the declarant was a participant in or an observer of the event; (2) the declaration related to the exciting event, explaining or elucidating it; (3) the declaration was a statement of fact, not opinion; and (4) the statement was made voluntarily. *Id.* (citations omitted).

<sup>47</sup>See *Reburn v. State*, 421 N.E.2d 604 (Ind. 1981) (three hours); *Ketcham v. State*, 240 Ind. 107, 162 N.E.2d 247 (1959) (two hours); *Pittsburgh, C. & S.L. Ry. v. Wright*, 80 Ind. 182 (1881) (thirty minutes); *State v. Dutton*, 405 N.E.2d 560 (Ind. App. 1980) (ten minutes); *Cauldwell, Inc. v. Patterson*, 133 Ind. App. 138, 177 N.E.2d 490 (1961) (one hour).

<sup>48</sup>*Block v. State*, 265 Ind. 569, 356 N.E.2d 683 (1976) (rape victim drove fifteen minutes to sister's home and immediately made statement). *Cf.* *Choctaw v. State*, 270 Ind. 545, 387 N.E.2d 1305 (1979) (court admitted as an excited utterance a statement made by a rape victim to the first police officer to arrive at her home, stating that the declaration was made within an hour of the attack, without being more specific about exactly how much time had elapsed).

<sup>49</sup>441 N.E.2d 436 (Ind. 1982).

room physician asked her what happened, and she told him she had been in a fight with her husband. The court ruled that despite the lapse of time and the fact that it was made in response to questions, her statement qualified as an excited utterance:<sup>50</sup>

The length of elapsed time between when the declarations were uttered and when the occurrence took place is only one element to be considered in determining their spontaneity. Similarly, that the statements were made in response to inquiries is also only one factor to be considered.

. . . .

. . . [Decedent's] condition rapidly deteriorated at the hospital and decedent constantly asked if she were going to die. The facts and circumstances demonstrate that the excitement from decedent's injuries and attendant pain, continued and controlled her thoughts and actions from the moment that the wounds were inflicted until she expired. Whether a statement is to be admitted as an excited utterance is a matter within the discretion of the trial judge and here we find no abuse of that discretion.<sup>51</sup>

The ruling in *Gye* appears to bring Indiana into line with other jurisdictions that follow the modern trend regarding excited utterances.<sup>52</sup> This hearsay exception has evolved from permitting only spontaneous exclamations made contemporaneously with the startling event, to include all utterances made while in an excited state of mind. Older cases referred to the exception as "res gestae" or "spontaneous exclamations," and tended to require literal spontaneity; only declarations made contemporaneous with or immediately after a startling event were admitted under the exception.<sup>53</sup> The modern trend, exemplified by the Federal Rules of Evidence,<sup>54</sup> is to call the exception "excited utterances," and shift the focus of the inquiry from spontaneity to whether the statement was made while the declarant was still under the stress and excitement of the event, regardless of the time that has elapsed. In other jurisdictions, statements made as long as fourteen hours after the startling event have been held to qualify as excited utterances if there is evidence the declarant was still in an excited mental state.<sup>55</sup> It is probable, however, that as the elapsed

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<sup>50</sup>*Id.* at 438.

<sup>51</sup>*Id.* (citations omitted).

<sup>52</sup>Although the language of the opinion indicates that the court has shifted its focus, the court also stated that any error in admitting the statement the victim made to the doctor was harmless because the statement was only cumulative of other evidence.

<sup>53</sup>*See, e.g.,* *Daywitt v. Daywitt*, 63 Ind. App. 444, 114 N.E. 694 (1917).

<sup>54</sup>*See* FED. R. EVID. 803(2) (statements made while "under the stress of excitement caused by the event or condition").

<sup>55</sup>*See* *State v. Stafford*, 237 Iowa 780, 23 N.W.2d 832 (1946); *see also* *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) (statement by a child one hour after assault admissible); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (statement by child a few

time between the event and the declaration increases, stronger evidence will be needed to prove that the declarant was still in a state of excitement.

### C. Evidence of Prior Criminal Activity

Evidence that a criminal defendant has committed crimes other than the one charged generally is not admissible.<sup>56</sup> Once a jury hears that a defendant has a criminal record, especially if the defendant has been convicted for similar crimes, it is more likely to convict him or her.<sup>57</sup> Indiana courts have long recognized that there is an automatic unfavorable reaction in a juror's mind upon discovering that the defendant has a prior record, which makes such evidence presumptively inadmissible because of its highly prejudicial effect.<sup>58</sup> Nevertheless, if evidence of prior criminal activity has some substantial probative value on an issue other than the defendant's general criminality, it may be admissible. This general exception is applied in many common situations. Evidence of other crimes may be admissible to show knowledge, intent, or malice, to impeach credibility, to establish motive when one crime is committed to cover an earlier crime, or to prove the identity of the defendant.<sup>59</sup> One common use of such evidence is to prove the identity of the defendant as the perpetrator of the crime by establishing a common scheme or plan.<sup>60</sup>

The exception to the rule that evidence of prior criminal activity is not admissible may be the most misunderstood doctrine of evidence. Too often, the inquiry into admissibility begins and ends with the attaching of a convenient label. There is a tendency on the part of courts and at-

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hours after assault admissible); *Wallace v. State*, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (statements one to two hours after the event admissible).

<sup>56</sup>*E.g.*, *Malone v. State*, 441 N.E.2d 1339, 1345-46 (Ind. 1982); *Watts v. State*, 229 Ind. 80, 102-04, 95 N.E.2d 570, 579-80 (1950).

<sup>57</sup>*See* H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 160 (1966). In an informal experiment conducted by the author of this Survey Article, students in evidence classes at Indiana University School of Law—Bloomington were asked to decide the guilt or innocence of a defendant based on a summary of the evidence for and against him. With all other facts being identical, the conviction rate jumped from 15% to 45% when students were told that the defendant had a prior record of similar criminal activity.

<sup>58</sup>*See, e.g.*, *Malone v. State*, 441 N.E.2d 1339, 1345-46 (Ind. 1982); *Blue v. State*, 250 Ind. 249, 235 N.E.2d 471 (1968); *Vaughn v. State*, 215 Ind. 142, 19 N.E.2d 239 (1939).

<sup>59</sup>*See* J. TANFORD & R. QUINLAN, *supra* note 22, § 44.7, at 220-21 and cases cited therein.

<sup>60</sup>The Indiana Supreme Court discussed the reason for allowing the use of evidence of prior criminal activity to show a common plan or scheme in *Malone v. State*, 441 N.E.2d 1339 (Ind. 1982):

The operative rationale is that if an accused is known to have committed a crime in a particularly distinctive way, then that accused can probatively be considered as having committed another similar crime if the similar crime was also committed in the same particularly distinct way. . . . [T]his Court requires a strong showing that the different criminal actions were so similarly conducted that the method of conduct can be considered akin to the accused's "signature."

*Id.* at 1346.

torneys to assume that evidence of other crimes is automatically admissible once it has been characterized as evidence of a common scheme or plan, identification, intent, and so forth.<sup>61</sup> The failure to rigorously analyze the underlying relevancy of the evidence often leads to the admission of evidence of prior criminal activity on issues that are not actually contested. This amounts to allowing evidence with very low probative value despite its highly prejudicial effect.

The proper balancing of the probative value of evidence of prior criminal activity against its prejudicial effect was illustrated by a series of cases decided during the survey period. The most thorough discussion of the problem is found in *Malone v. State*.<sup>62</sup> Malone was charged with rape but claimed that the victim consented. The State offered evidence that Malone had raped another woman six weeks after the incident that was the basis of the charge in this case. The supreme court reversed Malone's conviction on the ground that evidence of the other rape had little probative value and was highly prejudicial.<sup>63</sup> The court stated:

To indiscriminately admit proof of criminal activity beyond that specifically charged may compel a defendant to meet accusations without notice and may effectively negate the due process and presumption of innocence which our system of justice accords to every accused. Moreover, the admissibility of such evidence may raise collateral issues which confuse the jury or divert its attention from the actual charges before it.<sup>64</sup>

The court noted that there are exceptions such as the use of such evidence to prove intent, motive, or common scheme or plan. However, pigeonholing the evidence into one of those categories does *not* make it automatically admissible. The court explained:

To be admissible according to any one of these exceptions, however, *the evidence must possess substantial probative value* [and be so] specifically and significantly related to the charged crime in time, place and circumstance as to be logically relevant to one of the particular excepted purposes.<sup>65</sup>

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<sup>61</sup>See, e.g., Karlson, *supra* note 11, at 196-99 (evidence of common scheme allowed to prove that defendant is a professional criminal without any showing of particular relevancy).

<sup>62</sup>441 N.E.2d 1339 (Ind. 1982).

<sup>63</sup>*Id.* at 1348.

<sup>64</sup>*Id.* at 1346 (citations omitted).

<sup>65</sup>*Id.* (emphasis added) (citations omitted). The court used common scheme or plan as an illustration:

For instance, evidence of other criminal activity is commonly allowed to prove the identification of an accused according to the common scheme or plan exception. . . . Notwithstanding, if the identification of an accused can be proved by other evidence or if an accused's identity is not a material issue, then the admission of evidence of other criminal activity is improper to establish identity.

*Id.* (citations omitted).

The court held because the only real issue in *Malone* was the victim's consent—the defendant admitted the sexual intercourse—there was no material issue on which the evidence of the prior rape could be admitted. The court noted that “[t]he fact that one woman was raped has no tendency to prove that another woman did not consent.”<sup>66</sup>

The requirement that evidence of other crimes have particular relevancy before it is admissible can be further illustrated by comparing two recent cases involving the admissibility of “mug shot” photographs of the defendant. In *Miller v. State*,<sup>67</sup> the supreme court reversed a rape conviction because the State was allowed to introduce mug shot photographs that suggested the defendant had a prior criminal record. In *Smith v. State*,<sup>68</sup> the court affirmed a conviction despite the State's use of mug shot photographs. The difference in result is explained by the fact that in *Smith* the mug shots had particular relevancy on a contested issue, while in *Miller* they did not.

In *Smith*, the defendant asserted an alibi defense and questioned the victim's opportunity to observe, and subsequently identify, his assailant. Under those circumstances, the court held that it was proper for the State to introduce the mug shot and prove the victim had been able to identify the photograph in a photo array “to rebut the defendant's challenge to the reliability of the victim's in-court identification.”<sup>69</sup> The identity of the assailant was a central, material issue, and the victim's ability to identify the mug shot was of particular relevancy. In *Miller*, the rape victim identified her assailant by selecting a mug shot photograph of the defendant from a photo array. The photograph was subsequently introduced at trial on the issue of identity. In contrast to *Smith*, however, the defendant's identity was admitted in the opening statement and the only genuinely contested issue was consent. Therefore, the court found that the photograph had no evidentiary value because identification was not a contested issue.<sup>70</sup>

The supreme court's decision in *Jackson v. State*<sup>71</sup> also demonstrated that evidence of prior criminal activity is admissible if particularly relevant to a contested issue. In *Jackson*, the State alleged that the defendant robbed and shot a cab driver, and that his accomplice drove a getaway car. The defendant claimed *he* drove the car and the accomplice pulled the trigger. Thus, the identity of the shooter was in issue.<sup>72</sup> The trial court

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<sup>66</sup>*Id.* at 1347.

<sup>67</sup>436 N.E.2d 1113 (Ind. 1982).

<sup>68</sup>445 N.E.2d 85 (Ind. 1983).

<sup>69</sup>*Id.* at 87 (citation omitted).

<sup>70</sup>436 N.E.2d at 1120.

<sup>71</sup>446 N.E.2d 344 (Ind. 1983).

<sup>72</sup>Arguably, because the accomplice was equally guilty of murder as an accessory, *id.* at 346 (citations omitted), it made no *legal* difference who actually pulled the trigger. Nevertheless, because the question could have affected the jury's willingness to find the defend-

allowed the State to introduce evidence of a similar crime committed by the defendant to prove that the defendant was the shooter in the instant case. In the prior crime, the victim positively identified the defendant as the shooter, and the defendant admitted that he, not the accomplice, pulled the trigger. The supreme court, after lengthy analysis, found the two crimes “sufficiently similar to constitute Appellant’s criminal ‘signature’ ”.<sup>73</sup> Therefore, evidence of the other crime was admissible to show a common scheme or plan because it was relevant to a contested issue. Although the court did not articulate its reasons for finding relevancy, they are clear from the nature of the case; the prior crime was relevant evidence on the contested issue of whether the defendant shot the cab driver in the second crime.<sup>74</sup>

#### D. Expert Testimony—“Reasonable Medical Certainty”

In *Noblesville Casting Division of TRW v. Prince*,<sup>75</sup> the Indiana Supreme Court held that medical experts are not restricted to giving opinions that can be stated with reasonable medical certainty.<sup>76</sup> The justices

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ant guilty and easily could have affected sentencing, the question of the identity of the shooter was a legitimate material issue.

<sup>73</sup>*Id.* at 347.

<sup>74</sup>See generally J. TANFORD & R. QUINLAN, *supra* note 22, § 44.7, at 220-21 (to use common scheme or plan to prove identity, the other crimes must be similar, the manner of committing them must be so distinctive as to constitute a “signature,” and the evidence must positively connect the defendant to the other crime). See also C. McCORMICK, *supra* note 10, § 190, at 448-49.

Given this consistent requirement that evidence of prior crimes is only admissible if it has some specific relevancy, the courts’ approach in “drug peddling” cases, such as *Downer v. State*, 429 N.E.2d 953 (Ind. 1982), is troublesome. See also *Manuel v. State*, 267 Ind. 436, 370 N.E.2d 904 (1977); *Ingle v. State*, 176 Ind. App. 695, 377 N.E.2d 885 (1978); *Miller v. State*, 167 Ind. App. 271, 338 N.E.2d 733 (1975). In *Downer*, the court admitted evidence of the defendant’s five years of prior drug dealings “to show a common scheme or plan [on defendant’s part] to engage in drug peddling.” 429 N.E.2d at 955. The court, however, gave no explanation of how this was relevant to a contested issue. It is well settled that evidence of other crimes is not admissible merely to show the defendant’s tendency to commit certain types of crimes, *Manuel*, 267 Ind. at 438, 370 N.E.2d at 905-06 (and cases cited therein), yet allowing prior drug crimes to show the defendant to be a drug dealer seems to do no more than show his tendency to commit drug offenses. One commentator has suggested that common scheme or plan evidence may always be used to show that the crime charged is part of a larger scheme, *Karlson*, *supra* note 11, at 198, but does not explain what relevancy such evidence has. Proving that the defendant has a lengthy criminal history can only confuse the issues, increase the juror’s willingness to convict the defendant for past actions, and allow the prosecution to bootstrap a weak case. Occasional cases like *Downer*, in which the legitimate evidence against the defendant was strong, and the issue of the materiality of prior crimes was not discussed, probably should be viewed as harmless error cases, and not read as a judicial blank check to allow the State to prove the defendant’s tendency to commit certain crimes. See C. McCORMICK, *supra* note 10, § 190, at 448-49. See *supra* text accompanying note 3.

<sup>75</sup>438 N.E.2d 722 (Ind. 1982).

<sup>76</sup>*Id.* at 726.

held that opinions stated only in terms of probabilities and even possibilities have some probative value and are admissible, but the court could not decide what minimum standard to establish. The case is unusual because the court split two to two on the issue, with one justice not participating.<sup>77</sup> In both opinions, however, the justices agreed that prior case law requiring medical testimony to be phrased in terms of reasonable medical certainty should be overruled. Thus the case clearly abrogates the reasonable-medical-certainty standard, but fails to replace it with anything because of the absence of a majority. Justice Hunter, who wrote the opinion for the court stated: "We here reject the notion that the admissibility and probative value of medical testimony is dependent upon the expert witness's ability to state conclusions in terms of reasonable medical certainty; lacking a clear majority here, our specific language in *Palace Bar* to the contrary should nonetheless be overruled."<sup>78</sup>

In the 1978 case of *Palace Bar v. Fearnot*,<sup>79</sup> the plaintiff sued for the wrongful death of her husband who had fallen down stairs at the Palace Bar. On the question of causation, however, the coroner and expert pathologist both testified that the decedent died of natural causes, and not as a result of the fall.<sup>80</sup> The pathologist did testify that it was *possible* the decedent died of a heart attack, and *possible* for a heart attack to be triggered by a fall, but he cautioned that there would be no way to prove it. Despite the absence of testimony establishing causation, a verdict was entered for the plaintiff.

The supreme court reversed, pointing out that the plaintiff had the burden of proof on proximate cause, and that there was a total absence of evidence on that issue. The only evidence on the subject showed that the decedent died of natural causes. In referring to the pathologist's speculation about the possibility of a trauma-induced heart attack, a unanimous court held:

A doctor's testimony can only be considered evidence when he states that the conclusion he gives is based on reasonable medical certainty that a fact is true or untrue. A doctor's testimony that a certain thing is *possible* is no evidence at all. His opinion as to what is possible is no more valid than the jury's own speculation . . . .<sup>81</sup>

From the nature of the case, it is clear the court was not attempting to define a general standard for the admissibility of expert opinions.

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<sup>77</sup>Justice Hunter, joined by Justice Prentice, wrote the opinion of the court. Justice Pivarnik wrote a concurring opinion joined by Chief Justice Givan. Justice DeBruler did not participate.

<sup>78</sup>438 N.E.2d at 726.

<sup>79</sup>269 Ind. 405, 381 N.E.2d 858 (1978).

<sup>80</sup>The coroner stated the cause of death was a cerebral hemorrhage, and the pathologist found the decedent died as a result of heart disease. *Id.* at 407, 381 N.E.2d at 860.

<sup>81</sup>*Id.* at 415, 381 N.E.2d at 864.

Rather, it was making the point that when an expert testifies that in his opinion a result was caused by one thing, and also testifies that a second cause is possible but not likely, his testimony will not support a verdict based on that second cause. The statement about reasonable medical certainty, then, probably was not intended to be taken literally or as a general standard.

In *Noblesville Casting*, the medical expert similarly testified in terms of possibilities rather than medical certainty. However, the testimony was much stronger than that given in *Palace Bar*. When questioned about causation, plaintiff's medical expert stated that the aggravation of a pre-existing injury *could have* been caused by external trauma and that it was *possible* to reinjure one's back in the manner plaintiff claimed,<sup>82</sup> language similar to that used by the expert in *Palace Bar*. There was, however an important difference in the testimony: in *Palace Bar*, the expert clearly stated that another cause was more likely, but in *Noblesville Casting*, the "possible" cause was itself the most likely. All four justices agreed that this testimony was properly admitted even though not phrased in terms of reasonable medical certainty,<sup>83</sup> thus rejecting the strict semantic approach implied by the language in *Palace Bar*.

The two opinions in *Noblesville Casting* diverge on the question of how to define the relevancy standard for expert testimony. Justice Hunter would eschew a precise standard and decide on a case-by-case basis whether the expert's testimony had probative value.<sup>84</sup> Hunter would let the expert testify as he sees fit because questioning and cross-examination about the degree of certainty will give the jury enough information to accept or reject the expert's opinion.<sup>85</sup> This approach clearly would allow experts to discuss possibilities as well as probable and certain results.

Justice Pivarnik concurred in the result because he disagreed with Hunter's view concerning the value of expert testimony based only on "possibilities."<sup>86</sup> Pivarnik would require that opinions be based at least on probabilities; mere possibilities are too speculative to have probative value.<sup>87</sup> Justice Pivarnik found that:

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<sup>82</sup>438 N.E.2d at 726.

<sup>83</sup>*Compare supra* text accompanying note 78 with 438 N.E.2d at 738 (Pivarnik, J., concurring).

<sup>84</sup>*Id.* at 731.

<sup>85</sup>Justice Hunter stated that:

[T]o hinge the question whether an expert's opinion is admissible and probative on the willingness . . . to say that such-and-such is "reasonably certain," as opposed to "probable" or "possible," is to impose on the expert a question which elevates the law's demand for certainty in language over the state of the particular art

. . . .

*Id.* at 727. As Justice Hunter's numerous citations indicate, this approach is followed in many other jurisdictions and represents the modern trend. *See id.* at 727-29, and cases cited therein.

<sup>86</sup>438 N.E.2d at 737 (Pivarnik, J., concurring).

<sup>87</sup>*Id.* at 737-38.



[E]vidence which speaks only to possibilities [cannot] be admissible as probative evidence, regardless of the status of the witness giving it . . . . It is impossible for every expert witness to testify with certainty that a given scientific fact or result is apparent. But by applying his experience in the field and the analytical processes to which he testifies, his certainty must be of such a degree that it is more than a bare possibility.<sup>88</sup>

An analysis of the two opinions lead to the conclusion that the distinction between them is more semantic than real. Justice Hunter's opinion concedes that an expert's opinion based on mere possibilities—an opinion that lacks reasonable certainty or probability—is not sufficient evidence to support a verdict, although it is admissible as having some probative value.<sup>89</sup> The concurrence was primarily concerned with the issue of what kind of testimony will support a verdict. The concurring justices probably would have to admit that once one expert testifies that a particular conclusion is probable, a rebuttal expert could be called to testify that the state of the art refutes such a statement and that a series of conclusions are equally possible. In fact, the concurrence approves the testimony actually given in *Noblesville Casting*, which consisted of the expert's testimony about possibilities.<sup>90</sup> Thus, it is likely that testimony as to possibilities is relevant once there is a legitimate issue about whether one of the possibilities is more likely than the others.<sup>91</sup> The plaintiff, however, must offer some evidence that a particular result is the most probable to sustain a verdict.

#### *E. Previously Hypnotized Witnesses*

Whether to allow the testimony of a witness who was hypnotized before trial is an issue currently being debated in many jurisdictions.<sup>92</sup> Witnesses are often able to remember extraordinary details about crimes when under hypnosis, and police departments are increasingly resorting to this technique as an investigative tool. Medical authorities, however, caution that there is a dangerous potential for abuse when hypnotically enhanced memory is used as the basis for courtroom testimony. Hypnotically recalled testimony can be a mixture of fact and fantasy based

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<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 731.

<sup>90</sup>*Id.* at 738 (Pivarnik, J., concurring).

<sup>91</sup>See *Jones v. State*, 425 N.E.2d 128 (Ind. 1981) (court approved testimony based on neutron activation analysis evidence that bullet "could have come" from certain box of ammunition); *Herman v. Ferrell*, 150 Ind. App. 384, 276 N.E.2d 858 (1971) (speculative medical testimony admissible); *Magazine v. Shull*, 116 Ind. App. 79, 60 N.E.2d 611 (1945) (medical experts may use words like "might," "could," and "possible").

<sup>92</sup>See, e.g., cases cited *infra* notes 93-96. For a further discussion of the use of hypnotized witnesses, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 167 (1984).

on suggestive words or cues used by the hypnotist, and neither the expert nor the subject may be able to distinguish between them. A person under hypnosis may unconsciously create answers if he or she cannot recall the details being sought, a process called "confabulation." A hypnotized individual not only is easily influenced, but also is highly motivated to please the hypnotist. Most importantly, once a person has awakened from a hypnotic trance, he or she usually will be confident that everything in his or her memory—both fact and hypnotically induced fantasy—is factually based, and this conviction cannot be undermined through cross-examination.<sup>93</sup>

Courts faced with an objection to the testimony of a previously hypnotized witness must undertake a difficult balancing of the legitimate investigative needs of the police against the danger of inaccurate trial testimony resulting from suggestion. Although no consensus has yet been reached, the majority of jurisdictions either prohibit hypnotically induced testimony altogether,<sup>94</sup> or allow it only if certain safeguards against undue suggestion are followed.<sup>95</sup> A few courts have held that hypnotically refreshed testimony is always admissible, and that its inherent problems and the possibility of suggestion go to the weight and credibility, not to the admissibility of the testimony.<sup>96</sup>

During the survey period, the Indiana Supreme Court decided five cases concerning the testimony of previously hypnotized witnesses. Considered together, these cases establish fairly clear guidelines for the admissibility of testimony influenced by hypnosis. Indiana, for the most part, has taken the minority position that such testimony is admissible, and that the possibility that the witness' memory has been altered by suggestive procedures goes only to its weight. There is one clear exception: any evidence derived for the *first time* during a hypnotic session is *per se* inadmissible.

The first hypnosis case, *Strong v. State*,<sup>97</sup> concerned the admissibility of identification evidence. An eyewitness to a robbery-murder was hyp-

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<sup>93</sup>See *Pearson v. State*, 441 N.E.2d 468, 471-72 (Ind. 1982). See generally D. CHEEK & L. LECRON, *CLINICAL HYPNOTHERAPY* 13 (1968); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980); Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56 (Apr. 1981); Note, *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 IND. L.J. 349 (1982).

<sup>94</sup>See *Pearson v. State*, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

<sup>95</sup>The leading case is *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981), in which the court required the following safeguards suggested by experts in hypnosis: (1) that the session be conducted by an impartial, experienced psychiatrist or psychologist, not regularly employed by the police; (2) that the witness give a detailed narrative statement before being hypnotized; (3) that the entire session be recorded; and (4) that no police be present during the session. See also *Pearson v. State*, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

<sup>96</sup>See *Pearson v. State*, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

<sup>97</sup>435 N.E.2d 969 (Ind. 1982). Before *Strong*, the supreme court had heard only two cases involving previously hypnotized witnesses. In both, the defendant had waived any

notized by a police officer, and a composite drawing of the killer was made from the description the witness gave while in a hypnotic trance. The drawing was admitted at trial, and the defendant appealed. The court adopted the majority position, holding that evidence obtained for the first time from a witness while he or she is in a hypnotic trance "is inherently unreliable and should, therefore be excluded as having no probative value."<sup>98</sup> The court also noted that evidence produced during a hypnotic trance "is not susceptible of cross-examination and should be excluded for this reason alone."<sup>99</sup>

The defendant also objected to the witness's in-court identification on the grounds that the hypnosis was impermissibly suggestive. The court did not look at hypnosis cases from other jurisdictions, but rather, followed the reasoning in suggestive line-up cases, requiring only that the State show by "clear and convincing evidence, that the in-court identification of the defendant has a factual basis independent of the hypnotic session."<sup>100</sup> In upholding the admissibility of the in-court identification despite the police-conducted hypnosis, the court impliedly rejected the majority positions that hypnotically influenced testimony is either *per se* inadmissible, or inadmissible unless carefully safeguarded against police influence. Without even mentioning the possibility of requiring safeguards, the court found that because the witness had a good opportunity to view the killer and had picked his photograph out of a mug book *before* being hypnotized, there was a sufficient factual basis, independent of the hypnotic session, for the in-court identification. The court held that any possible changes in the witness' testimony caused by suggestive hypnosis "are matters which go to the weight to be given her testimony and not to its admissibility."<sup>101</sup>

Four months later, the supreme court decided the second hypnosis case, *Forrester v. State*.<sup>102</sup> This time, the testimony objected to concerned the corpus delicti of the crime rather than the identification of the accused. In *Forrester*, the victim of a rape had been hypnotized before trial.<sup>103</sup> The defendant objected claiming that the victim was therefore incompetent to testify at all. The supreme court rejected this argument, holding that the victim was competent to testify "with respect to necessary and relevant evidence of the corpus delicti of the charged offenses, which

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claim of error by failing to object. *Pavone v. State*, 402 N.E.2d 976 (Ind. 1980); *Merrifield v. State*, 400 N.E.2d 146 (Ind. 1980).

<sup>98</sup>435 N.E.2d at 970 (citations omitted). The court cited thirteen cases from ten jurisdictions in support of this position. *Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 970-71 (citations omitted). The court cited *Manson v. Brathwaite*, 432 U.S. 98 (1977) and *Morgan v. State*, 400 N.E.2d 111 (Ind. 1980) for the due process requirements for in-court identifications.

<sup>101</sup>435 N.E.2d at 971 (citing *Willis v. State*, 411 N.E.2d 696, 700 (Ind. Ct. App. 1980)).

<sup>102</sup>440 N.E.2d 475 (Ind. 1982).

<sup>103</sup>The opinion does not state whether she was hypnotized by the police, as in *Strong*, or by an independent expert as required in the safeguards discussed in note 95, *supra*.

evidence the prosecutrix had already provided to the police before the hypnotic session.”<sup>104</sup> The victim was therefore properly allowed to relate the incident during her testimony. The court’s opinion suggests that it might not have permitted the victim to identify the accused in court because the identification might have been solely the product of the hypnotic session; however, the court did not decide this issue because the defendant did not raise it. Thus, *Forrester* reaffirms two principles stated in *Strong*: evidence derived from a hypnotic session will be excluded, but hypnotically influenced testimony will be admitted if consistent with statements the witness made before being hypnotized. *Forrester* also implies that hypnotically influenced testimony concerning the elements of the offense may be more readily allowed than hypnotically influenced identification testimony.

*Pearson v. State*,<sup>105</sup> the third hypnosis case, was decided one month after *Forrester*. This case presents the supreme court’s most thorough treatment of the issue. In *Pearson*, a rape victim was hypnotized by a police officer after she had given a statement, but before trial. The trial court overruled the defendant’s pretrial motion to suppress the victim’s entire testimony because her memory had been contaminated and altered by the hypnosis. The supreme court for the first time reviewed at length the dangers of hypnosis and the cases from other jurisdictions excluding hypnotically influenced testimony or requiring stringent safeguards. Nevertheless, relying on *Strong* and *Forrester*, the court explicitly rejected the majority position, holding that the fact of hypnosis “should be a matter of weight with the trier of fact but not a *per se* disqualification of the witness.”<sup>106</sup>

The court in *Pearson* does appear to create one foundation requirement for the admission of hypnotically influenced testimony—the witness may only testify concerning matters about which he or she made pre-hypnosis statements.<sup>107</sup> Otherwise, the offeror will not be able to comply with the court’s requirement that:

In every case the trier of fact must be presented with sufficient evidence to be able to judge the reliability of the witness’s perception of the events *before* the hypnosis session, the manner in which the hypnosis procedure was conducted, and the degree to which the witness’s statements were changed by the hypnosis session.<sup>108</sup>

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<sup>104</sup>440 N.E.2d at 481.

<sup>105</sup>441 N.E.2d 468 (Ind. 1982).

<sup>106</sup>*Id.* at 473. The court suggested that “the careful attorney” will want to follow the safeguards mentioned in note 95, *supra*, but did not require these safeguards as foundation elements. 441 N.E.2d at 473. The court also stated that *no* special instruction on evaluating the credibility of a hypnotized witness may be given. “[I]t is erroneous to give an instruction which singles out one witness’s testimony and attacks its credibility.” *Id.* at 475.

<sup>107</sup>441 N.E.2d at 473.

<sup>108</sup>*Id.* (emphasis added).

In *Pearson*, the victim had positively identified the defendant as her assailant and described the corpus delicti of the offense before being hypnotized. She was then hypnotized in what the court admitted was a "very unreliable" session.<sup>109</sup> Nevertheless, the court explicitly held that she was a competent witness both as to the identification of the accused and as to the necessary elements of the corpus delicti. This holding impliedly rejects any notion that identification testimony might be treated differently than corpus delicti testimony.

In *Stewart v. State*,<sup>110</sup> the final hypnosis case, a witness made a statement about a shooting after he was hypnotized by a police officer. The witness testified that he remembered nothing new about the crime after the session.<sup>111</sup> The supreme court rejected a challenge that the witness was incompetent to testify at all because of the hypnosis. The issue was given little attention because the defendant had waived it.<sup>112</sup> Nevertheless, the court stated in dictum that a witness can testify after hypnosis about the corpus delicti of a crime if he provided such information before the hypnotic session.<sup>113</sup> The opinion refers back to the tantalizing suggestion in *Forrester* that hypnotically refreshed testimony about the elements of the crime may be treated differently than hypnotically aided identification testimony.<sup>114</sup>

*Peterson v. State*<sup>115</sup> is the most recent Indiana Supreme Court decision concerning hypnosis. In *Peterson*, a witness to a murder related the incident to the police, but was not able to identify the perpetrators from a photo-array or line-up. The witness was subsequently hypnotized by a police officer in an effort to enhance his memory. After the hypnotic session, the witness identified a photograph of the defendant as the murderer. Over the defendant's strenuous objections,<sup>116</sup> the witness testified in court about the details of the murder and made an in-court identification of the defendant. The defendant was found guilty of murder and appealed.

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<sup>109</sup>*Id.* Apparently, none of the safeguards suggested in note 95, *supra*, were present.

<sup>110</sup>442 N.E.2d 1026 (Ind. 1982).

<sup>111</sup>It is astounding that the supreme court could place any reliance on the witness' own statement that he remembered nothing new, when the court had itself noted only one month before that "[i]t is usually impossible for . . . the subject . . . to distinguish between the fact and fantasy even when the subject is brought out of the hypnotic trance." *Pearson v. State*, 441 N.E.2d 468, 471 (Ind. 1982).

<sup>112</sup>The defendant failed to raise the issue of the witness' competency to testify in his Belated Motion to Correct Errors. 442 N.E.2d at 1031.

<sup>113</sup>*Id.* (citing *Forrester v. State*, 440 N.E.2d 475 (Ind. 1982)).

<sup>114</sup>442 N.E.2d at 1031. It is unlikely that the two kinds of testimony will in fact be treated differently. The court, in *Pearson*, the only case presenting a proper objection and both kinds of testimony, treated them the same.

<sup>115</sup>448 N.E.2d 673 (Ind. 1983).

<sup>116</sup>The defendant's motion to suppress, motion in limine, and objection at trial were all overruled by the trial court. *Id.* at 674.

The supreme court reversed the defendant's conviction in an opinion that explored the merits and dangers of hypnosis at some length.<sup>117</sup> The court found that the witness' testimony about the facts of the crime was properly admitted but that the admission of his in-court identification of the defendant was reversible error.<sup>118</sup> The difference in treatment, however, was not based upon a distinction between hypnotically aided testimony about the corpus delicti of the crime and hypnotically aided identification testimony. Rather, the distinction was made because "there was an independent factual basis for [the witness'] general testimony with respect to the occurrence of [the] murder"<sup>119</sup> but the in-court identification was "the direct [result] of a hypnotic session."<sup>120</sup> Furthermore, the hypnotically aided in-court identification did not allow the defendant "to exercise his due process rights to confront and cross-examine."<sup>121</sup>

Justice Hunter wrote a separate concurring opinion in which he made an effort to clarify the supreme court's position on hypnotically aided testimony.<sup>122</sup> He stated that the Indiana position falls in between the "total exclusion" rule and the jurisdictions that allow all hypnotically aided testimony with the associated problems going to the weight of the evidence.<sup>123</sup>

Thus, the Indiana Supreme Court acknowledges the likelihood of confabulation, yet refuses to adopt realistic safeguards to protect the defendant. Experts stress that a reliable session can be conducted only by an impartial hypnotist with no police present,<sup>124</sup> yet Indiana will allow police

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<sup>117</sup>The majority opinion, however, only discussed one Indiana hypnosis case, *Strong v. State*, 435 N.E.2d 969 (Ind. 1982).

<sup>118</sup>448 N.E.2d at 678-79.

<sup>119</sup>*Id.* at 678.

<sup>120</sup>*Id.* at 675. The court compared the in-court identification to the composite drawing in *Strong*.

<sup>121</sup>*Id.* at 678. The court also discussed with apparent approval the defendant's argument that "hypnosis has not gained such general acceptance in the scientific community so as to constitute a reliable and legally valid procedure for enhancing memory." *Id.* at 674.

<sup>122</sup>*Id.* at 679 (Hunter, J., concurring).

<sup>123</sup>*Id.* (citations omitted). Justice Hunter delineated the court's position on the use of hypnotically aided testimony as:

(1) the witness is not totally incompetent to testify and there will be no error when the witness testifies to what was remembered before the hypnosis; (2) any evidence derived from a witness while he or she is under hypnosis is inherently unreliable and must be excluded as having no probative value; (3) if evidence that is the product of a hypnosis session is admitted during trial, it will not be reversible error if the jury is aware of all the circumstances surrounding the hypnosis session and the degree to which the witness's statements were changed by the hypnosis, and if the changes in the witness's statements were not significant or did not relate to essential elements of the offense.

*Id.*

<sup>124</sup>*See State v. Mack*, 292 N.W.2d 264, 271 (Minn. 1980).

officers to hypnotize a key witness.<sup>125</sup> Experts point out that the hypnotized subject will be unaware that his or her memory has been changed by suggestion, making cross-examination to expose alterations impossible,<sup>126</sup> yet Indiana will not require that the state make a record of what the subject was told during hypnosis. In short, the supreme court has required only one of the safeguards that experts think necessary: the subject must have given a prior statement on the facts before being hypnotized. The only hypnotically influenced testimony that will be excluded is information on a matter brought up for the first time during a hypnotic trance. New details about an issue previously mentioned are admissible; only a totally new topic will be excluded. This absence of safeguards, when taken in conjunction with the court's refusal to permit a special cautionary instruction regarding hypnotically influenced testimony,<sup>127</sup> may lead to the conviction of some defendants on the basis of false evidence that is the product of advertent or inadvertent suggestion implanted during hypnosis.

#### F. *Breathalyzer Tests*

In order for the results of a breathalyzer test to be admissible, the state must prove three foundation elements:

1. The test was administered by an operator certified by the department of toxicology [of the Indiana University School of Medicine];
2. The equipment used in the test was inspected and approved by the department of toxicology; and
3. The operator used techniques approved by the department of toxicology.<sup>128</sup>

In *Boothe v. State*,<sup>129</sup> the fourth district court of appeals interpreted the third foundation element as requiring the State to introduce a certified copy of the department of toxicology's approved procedures for conducting a breathalyzer test. In *Boothe*, the evidence at trial concerning the techniques used by the operator consisted of the following:

Mr. Morrison: Officer Haverstock, is the routine procedure that you use in administering the test the same ones that were given you

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<sup>125</sup>See, e.g., *Stewart v. State*, 442 N.E.2d 1026, 1031 (Ind. 1982); *Pearson v. State*, 441 N.E.2d 468, 470 (Ind. 1982).

<sup>126</sup>441 N.E.2d at 471.

<sup>127</sup>*Id.* at 475 (no special instruction singling out the credibility of one witness may be given).

<sup>128</sup>*Klebs v. State*, 159 Ind. App. 180, 183, 305 N.E.2d 781, 783 (1974).

<sup>129</sup>439 N.E.2d 708 (Ind. Ct. App. 1982).

by the Department of Toxicology in their instructions . . . ?  
Officer Haverstock: Yes, those were the procedures that I followed.<sup>130</sup>

The court held that the operator's conclusion that he followed approved procedures was not sufficient to satisfy this part of the foundation. Instead, the court required the State to first prove what the approved techniques are through introduction of a certified official document from the department of toxicology, and then prove that the operator complied with them.<sup>131</sup>

In reaching this conclusion, the court relied primarily on two earlier decisions which held that breathalyzer tests were inadmissible because of inadequate proof on this foundation element. In one, the operator described his own procedures, but "the record [was] devoid of *any* evidence to establish that the procedure described resembled the procedure approved by the department of toxicology."<sup>132</sup> In the other, the State showed a videotape depicting the operation of the test and the operator's techniques, but again "the record [was] devoid of *any* evidence establishing that the procedure utilized resembled the procedure approved by the Department."<sup>133</sup> Neither operator testified that he followed approved procedures. In neither case did the court indicate *how* the State must prove what the department of toxicology approved procedures are, nor did either opinion imply that the operator's testimony that he followed approved procedures would be insufficient. There is a significant difference between requiring *some* evidence and requiring a certified copy of the department document. Nevertheless, the opinion in *Boothe* demands that the State offer a certified copy of the document. An important question raised by the *Boothe* decision is whether other methods of establishing correct procedures, such as the operator's own testimony, calling an expert witness from the department of toxicology, or asking for judicial notice, are precluded.

Presumably, the *Boothe* holding means that the other two parts of the breathalyzer foundation also require the introduction of copies of the appropriate department of toxicology documents. The State will have to prove that the operator was certified through a copy of that certificate, and that the equipment was inspected and approved by copies of those

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<sup>130</sup>*Id.* at 711. Apparently, there are two department documents—one detailed and one a summary checklist. In *Denman v. State*, 432 N.E.2d 426, 430 (Ind. Ct. App. 1982), the court found that either could be used, although it is not clear whether this is still good law after *Boothe*.

<sup>131</sup>The document would be admissible as an official record of the State under Trial Rule 44, *see* J. TANFORD & R. QUINLAN, *supra* note 22, § 25.3, at 119-21, and under IND. CODE § 9-11-4-5(c) (Supp. 1983) (certified copies of such document are admissible and constitute prima facie evidence of the approved technique).

<sup>132</sup>*Klebs v. State*, 159 Ind. App. 180, 184, 305 N.E.2d 781, 784 (1974) (emphasis added).

<sup>133</sup>*Hartman v. State*, 401 N.E.2d 723, 725 (Ind. Ct. App. 1980) (emphasis added).



documents.<sup>134</sup> *Boothe* does not address these other foundation elements explicitly, and no previous case has made the introduction of department documents absolutely essential; however, the conclusion seems logically compelled. The controlling statute explicitly prohibits the admission of breathalyzer test results unless the test was performed by a certified operator with certified equipment and chemicals.<sup>135</sup> The statute makes no mention of exclusion for failure to follow approved procedures. If a strict foundation requirement is attached to an only *implicit* requirement, surely the *explicit* requirements will be no less strictly enforced.

Taken in toto, these requirements make the introduction of breathalyzer results curiously different from the introduction of the results of other kinds of scientific tests. The results of scientific tests generally will be admissible if the operator's own testimony establishes his or her training and competency.<sup>136</sup> Yet the implications of *Boothe* are that a breathalyzer operator may not simply testify to being certified, but must produce the certificate. The requirements that scientific machines be working properly and that proper procedures were followed can be established in the usual case by the operator's testimony, because he or she is the expert.<sup>137</sup> *Boothe* holds to the contrary for breathalyzer tests. A partial, if not a satisfactory, explanation for treating breathalyzer tests differently can be found in the Indiana Code which explicitly states that breathalyzer results are not admissible unless the operator and equipment were certified,<sup>138</sup> and in state administrative regulations that provide that the departmentally approved method "shall be followed."<sup>139</sup> There are no similar provisions for other kinds of scientific tests.

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<sup>134</sup>Cf. *Denman v. State*, 432 N.E.2d 426 (Ind. Ct. App. 1982). In *Denman*, the State offered into evidence the certification document for the equipment and chemicals, and the court admitted them over the defendant's hearsay objection pursuant to IND. CODE § 9-4-4.5-6(b) (1982) ("The certificate . . . is admissible as evidence"). That code section has been replaced by a new act to the same effect. Act of Apr. 19, 1983, Pub. L. No. 143-1983, § 1, 1983 Ind. Acts 989, 993 (codified at IND. CODE § 9-11-4-5(c) (Supp. 1983)).

<sup>135</sup>IND. CODE § 9-11-4-5(d) (Supp. 1983).

<sup>136</sup>A physician need not introduce a certified copy of his or her medical license to be qualified as an expert, but may testify that he or she is licensed.

<sup>137</sup>See *Reid v. State*, 267 Ind. 555, 375 N.E.2d 1149 (1978) (involving trace metal detection).

<sup>138</sup>IND. CODE § 9-11-4-5(a), (d) (Supp. 1983).

<sup>139</sup>260 IND. ADMIN. CODE § 1-3-1(2) (1979).

## VIII. Insurance

STEPHEN E. ARTHUR\*

The Indiana courts and legislature addressed a number of significant issues during this survey period which have long confused and frustrated the processing and settlement of insurance claims.<sup>1</sup> The most significant of these cases was *Travelers Indemnity Co. v. Armstrong*<sup>2</sup> which resolved three important questions: (1) the burden of proof required to sustain a punitive damage award against an insurance company, (2) the interpretation of "actual cash value" (ACV), and (3) the evidentiary vehicle for proving ACV. Additionally, the Indiana legislature adopted a fourteen-point plan designed to define and sanction an insurance company's unfair claim settlement practices<sup>3</sup> and enacted a comparative negligence act<sup>4</sup> which will undoubtedly alter traditional settlement mechanisms available to a claimant.

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<sup>1</sup>There were other insurance cases decided during this survey period which are not discussed in this article. See, e.g., *Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990 (Ind. 1983) (group term life insurance policy with no cash surrender value is not property for purposes of determining marital assets; restraining order enjoining disposition of property did not prohibit changing beneficiary of group policy); *Indiana Ins. Co. v. Ivetich*, 445 N.E.2d 110 (Ind. Ct. App. 1983) (insurer held liable to bailee for loss to bailor's property); *First United Life Ins. Co. v. Northern Indiana Bank & Trust Co.*, 444 N.E.2d 1241 (Ind. Ct. App. 1983) (determining the duty of an insurer to notify assignee of a life insurance policy of the policy's termination for nonpayment of premiums); *Integrity Ins. Co. v. Lindsey*, 444 N.E.2d 345 (Ind. Ct. App. 1983) (insurer's conduct constituted waiver of policy provisions for written notice, formal proof of loss and right to appraisal); *Lee v. Lincoln Nat. Bank & Trust Co.*, 442 N.E.2d 1147 (Ind. Ct. App. 1982) (Michigan No-Fault Insurance Act held extraterritorial and not a bar to Michigan residents' action against Indiana residents for automobile accident occurring in Indiana); *Asbury v. Indiana Union Mut. Ins. Co.*, 441 N.E.2d 232 (Ind. Ct. App. 1982) (liability of homeowner insurer for damage to animal pelts collected as part of insured's hobby of hunting animals); *Paul Revere Life Ins. Co. v. Gardner*, 438 N.E.2d 317 (Ind. Ct. App. 1982) (action under Massachusetts law requiring insurer to give notice of conversion rights under employer group life policy upon termination of insured's employment); *Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360 (Ind. Ct. App. 1982) (determining the extent of insurer's subrogation rights in action against subcontractor); *Allstate Ins. Co. v. Neumann*, 435 N.E.2d 591 (Ind. Ct. App. 1982) (defining the term "resident" within the context of an uninsured motorist provision).

<sup>2</sup>442 N.E.2d 349 (Ind. 1982).

<sup>3</sup>Act of Apr. 19, 1983, Pub. L. No. 259-1983, § 2, 1983 Ind. Acts 1669, 1675-76 (codified at IND. CODE § 27-4-1-4.5 (Supp. 1983)).

<sup>4</sup>Act of Apr. 21, 1983, Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, 1930-33 (codified at IND. CODE §§ 34-4-33-1 to -8 (Supp. 1983)).

### A. General Insurance Principles

1. *Punitive Damages Against an Insurer.*—Indiana courts traditionally have held that punitive damages are not permitted in contract cases.<sup>5</sup> Yet, punitive damages have been authorized against an insurer when: (1) the breach of an insurance contract is accompanied by an independent common law tort such as fraud or deceit, or (2) wrongful conduct, not arising to an independent tort, is mingled with elements of fraud, malice, gross negligence, bad faith or oppression; and the public interest would be served by the deterrent effect of punitive damages upon future wrongdoers.<sup>6</sup>

These "tortious conduct" exceptions have radically altered adherence to the general rule and resulted in frequent punitive damage claims by insureds in actions to enforce their rights under insurance contracts.<sup>7</sup> Additionally, plaintiffs' attorneys have often demonstrated a propensity to seek large punitive damage awards for an insurer's breach of contract even though the breach arose out of a marginal good faith claim dispute or resulted from an insurer's negligent preparation or settlement of the insured's claim.<sup>8</sup> This propensity has been reinforced by the application of a "preponderance of evidence" standard in proving punitive damage claims. The result of these factors has been frequently to place insurance companies in the untenable position of either paying questionable claims or denying such claims and, if proven wrong, suffering adverse punitive damage awards.<sup>9</sup>

Faced with this influx of punitive damage claims, the Indiana courts, during this survey period, substantially limited the substantive bases upon which a punitive damage award will be affirmed. In *American Family Insurance Group v. Blake*,<sup>10</sup> an insured sought payment of certain medical benefits and imposition of punitive damages against an insurer alleging

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<sup>5</sup>See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976).

<sup>6</sup>*Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976); see *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981); *Travelers Indem. Co. v. Armstrong*, 384 N.E.2d 607, 618 (Ind. Ct. App. 1979) (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976)), *aff'd in part, rev'd in part*, 442 N.E.2d 349 (Ind. 1982); *Jos. Schlitz Brewing Co. v. Central Beverage Co.*, 172 Ind. App. 81, 359 N.E.2d 566 (1977); *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972); see also Note, *Indiana's Allowance of Punitive Damages in Contract Actions Against Insurance Companies: How New Is It?*, 55 IND. L.J. 563 (1980); Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975).

<sup>7</sup>See Bourhis, *Recognition and Recovery for Bad Faith Torts*, 18 TRIAL 47 (Dec. 1982).

<sup>8</sup>See Albright, *Punitive Damages Litigation—Where Is Indiana Headed?*, in DAMAGES, THEIR NATURE AND PREVENTION 1983 VII- 1 (Indiana Continuing Legal Education Forum 1983).

<sup>9</sup>*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. 1982) (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976)).

<sup>10</sup>439 N.E.2d 1170 (Ind. Ct. App. 1982).

an unreasonable, willful and wanton refusal to pay the claim. The trial court entered summary judgment upon the medical benefits claim but denied the insured's claim for punitive damages. Affirming that adverse judgment, the Indiana Court of Appeals found no evidence of tortious conduct by the insurer.<sup>11</sup> The court determined that punitive damages are not appropriate when there is an "honest dispute," even when the insurer ultimately is determined to be in breach of the insurance contract.<sup>12</sup>

Similarly, *Nationwide Mutual Insurance Co. v. Neville*<sup>13</sup> involved an action arising out of a claim dispute under a group insurance contract which provided, in part, for accidental death benefits to members of a local volunteer fire department. The policy also provided generally for payment of death benefits if the "injury or a heart or circulatory malfunction" caused the insured's death.<sup>14</sup> An exclusion under the policy, however, provided for denial of benefits following death due to heart or circulatory malfunction if the insured experienced a heart or circulatory condition prior to accepting coverage under the policy. The insured, a volunteer fireman, suffered smoke inhalation and a heart attack during his performance of firefighting duties. Approximately one month later, while still being treated for those injuries, the insured died as a result of a massive heart attack. The insured's surviving spouse filed a claim for death benefits under the group policy, but the insurer denied that claim based upon evidence that the insured had been treated for hypertension prior to coverage, which the insurer argued was a circulatory condition excludable under the policy. The surviving widow then filed an action against the insurance company seeking compensatory damages for breach of the insurance contract and punitive damages. The jury awarded compensatory damages in the amount of \$30,000 and punitive damages in the amount of \$145,000.<sup>15</sup>

The Indiana Court of Appeals affirmed the compensatory verdict based on breach of contract but reversed the punitive damage award.<sup>16</sup> The court rejected arguments that the insurer's conduct constituted fraud, a "heedless disregard of the consequences," or a "bad faith" state of mind.<sup>17</sup> Stating that negligence will not support a claim for punitive

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<sup>11</sup>*Id.* at 1175.

<sup>12</sup>*Id.* The court stated that punitive damages are unfounded when the insurer's denial is based upon a good faith defense. *Id.* (citing *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981)).

<sup>13</sup>434 N.E.2d 585 (Ind. Ct. App. 1982).

<sup>14</sup>*Id.* at 586.

<sup>15</sup>*Id.* at 587-88.

<sup>16</sup>*Id.* at 589, 596.

<sup>17</sup>*Id.* at 595. The court stated that a claim denial "so ludicrous and outside the bounds of reason as to be tainted by fraud, oppression, bad faith, or gross negligence" would constitute bad faith. *Id.* The court further stressed that "'even a breach indicating substandard business conduct does not entitle the promisee to . . . punitive damages.'" *Id.* (quoting *Peterson v. Culver Educ. Found.*, 402 N.E.2d 448, 457 (Ind. Ct. App. 1980) (citing *Vernon*

damages, the court gave examples of conduct which would not support an award of punitive damages: (1) insurer's good faith and reasonable dispute of coverage which results in a breach of contract; (2) insurer's negligent investigation of a coverage claim; or (3) insurer's settlement practice which negligently falls below insurance industry standards.<sup>18</sup> As such, the court rejected the widow's attempt to characterize Nationwide's denial of benefits as conduct so unreasonable as to constitute bad faith, malice or oppressive conduct.<sup>19</sup>

Again, in *Continental Casualty Corp. v. Novy*,<sup>20</sup> an action to enforce a physician's disability claim, the trial court granted the physician's disability claim but rejected the punitive damage count. On appeal, the insured contended that the claim was denied in bad faith because the insurer failed to physically examine him or ascertain the nature of his subsequent employment. Thus, the insured argued, the failure to diligently investigate the claim, when evidence favorable to that claim was readily available, constituted oppressive and bad faith conduct.<sup>21</sup> The court rejected this contention and concluded that lack of diligent investigation into an insured's claim, standing alone, is insufficient to support a punitive damage award.<sup>22</sup>

Finally, in *D & T Sanitation, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>23</sup> the insured was denied punitive damages and the trial court entered a specific finding that the insurer's conduct was not " 'malicious or willful or obstreperous misconduct which would support punitive damages.' " <sup>24</sup> Affirming that adverse judgment, the Indiana Court of Appeals rejected the insured's assertion that an insurer's negligent selection of an appraiser or repair facility constituted bad faith conduct.<sup>25</sup>

The imposition of more stringent substantive limitations was further augmented by the adoption of a higher evidentiary standard in *Travelers*

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Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976))). Finally, a "heedless or reckless disregard of consequences" or "tortious conduct," as contemplated by *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976), involves a conscious and intentional wrongdoing which by nature is oppressive or malicious. 434 N.E.2d at 594; see *Prudential Ins. Co. v. Executive Estates, Inc.*, 174 Ind. App. 674, 369 N.E.2d 1117 (1977); *Bob Anderson Pontiac, Inc. v. Davidson*, 155 Ind. App. 395, 293 N.E.2d 232 (1973); *Capitol Dodge, Inc. v. Haley*, 154 Ind. App. 1, 288 N.E.2d 766 (1972).

<sup>18</sup>*Id.* at 595-96.

<sup>19</sup>*Id.* at 595.

<sup>20</sup>437 N.E.2d 1338 (Ind. Ct. App. 1982).

<sup>21</sup>*Id.* at 1355.

<sup>22</sup>*Id.* at 1356. The court concluded that a negligent failure to investigate a claim cannot be the basis for awarding punitive damages. Rather, the insured has the burden of showing that the preconditions to the insurer's obligation to pay a claim have been met. *Id.* (citing *Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565, 571-72 (7th Cir. 1978)).

<sup>23</sup>443 N.E.2d 1207 (Ind. Ct. App. 1983).

<sup>24</sup>*Id.* at 1209 (quoting the lower court opinion of Judge Dalton C. McAlister of the Allen Superior Court in this case).

<sup>25</sup>443 N.E.2d at 1209-10.

*Indemnity Co. v. Armstrong*.<sup>26</sup> In a clear effort to limit punitive damage awards in insurance disputes, the Indiana Supreme Court rejected the “preponderance” standard for one of “clear and convincing” evidence.<sup>27</sup> Noting that an insured has no inherent right to punitive damages and that these awards are merely a windfall to the lucky insured,<sup>28</sup> the court concluded that the public interest would best be served by encouraging litigation of “good faith” claim disputes.<sup>29</sup> The court stated that to allow an award of punitive damages, upon evidence of no greater persuasive value than that needed to support the underlying breach of contract, would impose such a risk on the insurer as to make questionable claims “nondisputable.”<sup>30</sup> Thus, an insurer would be coerced into paying all such claims in order to avoid the risk of an adverse punitive damage award.<sup>31</sup>

In support of the new evidentiary standard, the court stated:

In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff’s absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing. . . . And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof by clear and convincing

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<sup>26</sup>442 N.E.2d 349 (Ind. 1982).

<sup>27</sup>*Id.* at 358-63.

<sup>28</sup>*Id.* at 362 (citing *Indianapolis Bleaching Co. v. McMillan*, 64 Ind. App. 268, 113 N.E. 1019 (1916)).

<sup>29</sup>442 N.E.2d at 363.

<sup>30</sup>*Id.*

<sup>31</sup>The court stated that

[t]he public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes. “The infliction of this damage has generally been regarded as privileged, and not compensable, for the simple reason that it is worth more to society than it costs, i.e., the insurer is permitted to dispute its liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable.”

*Id.* (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976)).

evidence furthers the public interest when punitive damages are sought.<sup>32</sup>

Thus, at a minimum, the court has adopted a preference for an evidentiary standard which will not deter the judicial resolution of bona fide insurance claim disputes. Further, the court has left unsettled the scope of its holding and whether the "clear and convincing" evidentiary standard will be applied to all punitive damage claims, whether contractual or tortious in nature.

2. *Construction of Insurance Contracts.*—*Aetna Insurance Co. v. Monteith Tire Co.*<sup>33</sup> involved an injury sustained by the employee of a truck owner when a recapped tire, mounted by Monteith, exploded causing the rim assembly to strike the employee. Both Aetna and Midland Insurance Company tendered a defense to Monteith under full reservation of rights letters. Aetna then instituted an action against Midland seeking a declaration that Midland had exclusive coverage responsibility. Judgment was entered for Midland but the appellate court reversed.

The Indiana Court of Appeals determined that language in the insurance policy<sup>34</sup> must be given its plain meaning and that Aetna's policy excluded coverage for injuries resulting from any recapping service.<sup>35</sup> In fact, Monteith had received a premium reduction for an endorsement containing that exclusion. The court concluded that although "service" was not specifically defined in the policy, the mounting of recapped tires is a "service" within the ordinary meaning of that word.<sup>36</sup> Therefore, the policy was not ambiguous and Aetna was within its contractual rights to deny coverage.<sup>37</sup>

## B. Property Insurance

1. *Indemnity Contracts—Interpretation of Actual Cash Value.*—Indemnity contracts are designed to reimburse an insured without allowing the insured to profit from his loss.<sup>38</sup> As such, these contracts are generally construed to avoid placing the insured in a better position than

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<sup>32</sup>*Id.* at 362-63.

<sup>33</sup>443 N.E.2d 880 (Ind. Ct. App. 1983).

<sup>34</sup>Aetna's "Products Limitation Endorsement" provided:

"In consideration of a premium reduction, it is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and Property Damage Liability Coverage does not apply to Bodily Injury or Property Damage included within the completed operations hazard or products hazard for any tire retreading, recapping operations or the sales or service of same. ACCEPTED /s/ Ray W. Monteith"

*Id.* at 881 (quoting Record at 153).

<sup>35</sup>443 N.E.2d at 881.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982).

if no loss had occurred.<sup>39</sup> This principle is intended to discourage wagering or destruction of an insured's property in order to collect insurance proceeds.<sup>40</sup>

Two primary loss reimbursement mechanisms have been created with respect to property insurance: (1) actual cash value coverage (ACV) and (2) replacement cost coverage without a deduction for depreciation.<sup>41</sup> ACV is a pure indemnity contract designed only to put the insured in the same position as before the loss.<sup>42</sup> Although an ACV adjustment for new property will often be the cost of repair, this method of valuation is seldom used for an older building unless the damage is very minor. Where an older building is seriously damaged but not destroyed, the repair cost will typically be discounted to reflect depreciation "so that the insured will not receive the equivalent of a new building for a loss of the old one."<sup>43</sup> This method of computation is generally imposed to deny an insured the opportunity to profit from his loss, a result inconsistent with an indemnity contract.<sup>44</sup>

Replacement cost coverage, on the other hand, provides greater coverage than the standard ACV policy and therefore is not a strict indemnity contract.<sup>45</sup> In return for a higher premium, the insured will receive the cost of returning the damaged property to its original condition even if that cost exceeds the property's fair market value prior to the loss.<sup>46</sup> Thus, replacement cost coverage will often result in an enhancement of the dwelling's pre-loss value.<sup>47</sup>

*Travelers Indemnity Co. v. Armstrong*<sup>48</sup> compared these two loss reimbursement mechanisms and determined an insurer's liability under an ACV policy. Travelers issued a farmowner's policy that provided a \$15,000 liability limit on a dwelling. That policy provided coverage: "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality, . . . against all direct loss by fire." <sup>49</sup> The home was substantially damaged by fire and Travelers determined the cost of repair to be \$8,729.62. Travelers then offered the

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<sup>39</sup>*Id.* (citing 6 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 3823, at 218-19 (1972)); *Brand Distrib., Inc. v. Insurance Co. of N. America*, 532 F.2d 352 (4th Cir. 1976)).

<sup>40</sup>See generally Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 COLUM. L. REV. 818 (1949).

<sup>41</sup>*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 352 (Ind. 1982).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 353 (quoting Note, *supra* note 40, at 823).

<sup>44</sup>*Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 353 (Ind. 1982).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>442 N.E.2d 349 (Ind. 1982).

<sup>49</sup>*Id.* at 354 (emphasis added by the court). Travelers issued the "Actual Cash Value Form" approved for use in Indiana in 1955. *Id.* at 351.



insured \$6,497.22, an amount representing the actual cost of restoration depreciated by twenty-five percent.

Plaintiff rejected that offer and sued Travelers for breach of contract and tortious conduct. The trial court instructed the jury that Armstrong should receive the full loss to his dwelling, not to exceed the policy limits.<sup>50</sup> Travelers objected to this instruction alleging that the policy's language compelled a depreciation deduction so that the insured would not be unjustly enriched.<sup>51</sup> The jury returned a verdict of \$8,729.62 actual and \$25,000 punitive damages.

The Indiana Court of Appeals affirmed that judgment and concluded that so long as the dwelling could be repaired with "material of like kind and quality," Travelers must pay that cost up to the policy limit.<sup>52</sup> The appeals court found that a depreciation deduction would deny the insured the ability to restore the dwelling to its pre-loss functional efficiency, a result which did not comport with the underlying basis of the policy.<sup>53</sup> That decision sent immediate tremors throughout the insurance industry as the fundamental distinction between ACV and replacement cost coverage was eliminated. Thus, by rejecting traditional notions of indemnity, the court opened the door for ACV policyholders to obtain replacement cost coverage without paying the higher premiums normally associated with that coverage.

The Indiana Supreme Court reversed the court of appeals and determined that ACV is limited by three factors: (1) the policy limit, (2) the actual cash value of the lost property, and (3) the cost of repair or

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<sup>50</sup>*Id.* at 357-58. The trial court gave the following instruction:

You are instructed that insurance policy in question bound and required the defendant to pay the full direct loss resulting from a fire to the house in question within the stated limits of the policy, namely \$15,000. There are no provisions in the policy applicable to the tenant house that was damaged which either required or authorized the insurance company to reduce the amount payable under the contract below such an amount.

*Id.*

<sup>51</sup>*Id.* at 358. *See also* Travelers Indem. Co. v. Armstrong, 384 N.E.2d 607, 616 (Ind. Ct. App. 1979), *aff'd in part, rev'd in part*, 442 N.E.2d 349 (Ind. 1982).

<sup>52</sup>384 N.E.2d 607, 617 (Ind. Ct. App. 1979). The court of appeals posited the following rationale in support of its holding:

The insurance policy serves to insure against loss not exceeding the amount stated in the policy limit, and the payment of an amount less than the limit, which is not sufficient to restore or replace the functional efficiency provided by the property before the loss, does not comply with the policy.

... Because it is the insurer's undertaking to make the insured whole within the policy limits, the augmented damage resulting from increased costs of labor and materials is the liability of the insurer up to the stated limit of the insurance.

*Id.* at 615 (citations omitted).

<sup>53</sup>*Id.* at 615 (citing Fedas v. Insurance Co. of Pennsylvania, 300 Pa. 555, 151 A. 285 (1930)).

replacement.<sup>54</sup> The court noted that failure to account for depreciable components would result in the dwelling being restored to a value exceeding its pre-loss value,<sup>55</sup> a result inconsistent with the purpose of an indemnity contract.<sup>56</sup>

A similar outcome was reached in *Ohio Casualty Insurance Co. v. Ramsey*,<sup>57</sup> wherein insured property was totally destroyed by fire. The trial court interpreted an ACV policy, similar to the one analyzed in *Travelers*, to mean replacement cost without a depreciation deduction.<sup>58</sup> The appellate court rejected that approach and determined that replacement of a dwelling's functional efficiency is unfounded in a total loss case because the property will not be generally subject to restoration.<sup>59</sup> Therefore, "pure replacement cost" would permit an ACV policyholder, under the facts presented in *Ramsey*, to receive a new home of enhanced value, a result inconsistent with indemnity principles normally associated with an ACV insurance contract.<sup>60</sup>

Thus, these decisions have limited what the insurance industry feared would be a blanket application of "replacement cost" in ACV determinations and have preserved the fundamental distinction between ACV and replacement cost coverage. Further, this distinction appears equally applicable to both partial and total property loss cases. As such, policyholders must pay the higher premiums associated with replacement cost coverage before they will be able to reap the benefits of that type of coverage. Therefore, ACV policyholders should carefully re-examine their policies

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<sup>54</sup>442 N.E.2d at 354. The court stated:

The difference between factors No. 2 and No. 3, is that No. 2, according to the weight of authority, permits a reduction in liability in view of the very real consideration that following complete restoration of an extensively damaged building, the building will often be worth more than it was before the loss occurred. The degree to which this comes into play obviously varies with the physical condition and degree of obsolescence [sic] of the building, prior to the loss, and the extent of the damage insured against. The determination is further complicated by reasons of factors, other than mere age or physical deterioration, that also affect values.

*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 353.

<sup>57</sup>439 N.E.2d 1162 (Ind. Ct. App. 1982).

<sup>58</sup>*Id.* at 1164. In entering its judgment, the trial court ruled in part:

[T]he Court . . . finds that the subject property herein was destroyed by fire that the evidence herein showed that said dwelling cannot be repaired at a cost of less than face value of the insurance herein and that the replacement cost would far exceed the limits of the policy herein and that the plaintiff is entitled to replacement of said property or in the alternative the limits of the policy herein . . .

*Id.*

<sup>59</sup>*Id.* at 1166.

<sup>60</sup>*Id.* at 1169.

to determine if indemnity coverage is sufficient to protect their property interests.

2. *Broad Evidence Rule—Method for Proving Actual Cash Value of Loss.*—*Travelers* further analyzed the proper evidentiary vehicle for proving ACV and adopted the broad evidence rule.<sup>61</sup> That rule, characterized by the court as the majority rule of other jurisdictions, provides flexibility in determining the value of a loss and permits the trier of fact to consider every fact and circumstance which would logically contribute to a correct estimate, such as depreciation; replacement cost; fair market value; amount of loss; effect of over- or under-insurance; original cost versus cost of reproduction; and declarations against interest made by the insured.<sup>62</sup> The court noted that the broad evidence rule is more flexible than other evidentiary methods of computing ACV losses.<sup>63</sup> It concluded that a consideration of all relevant factors would foster the underlying goal of an indemnity contract, namely, to make the measure of recovery correspond to the actual loss sustained by the insured.<sup>64</sup>

3. *Innocent Co-owner's Right to Recover Insurance Proceeds.*—The Indiana Court of Appeals addressed the rights of an innocent spouse to receive insurance proceeds under a homeowner's policy for loss to a home which had been deliberately destroyed by that spouse's husband. In *Fuston v. National Mutual Insurance Co.*,<sup>65</sup> the innocent spouse was denied recovery in a jury trial following an instruction that, because of tenancy by the entirety, one spouse's act justifying the denial of recovery barred recovery for the innocent spouse.<sup>66</sup> The insurance policy excluded coverage

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<sup>61</sup>442 N.E.2d at 352-57; see also *Atlas Constr. Co. v. Indiana Ins. Co.*, 160 Ind. App. 33, 39-40, 309 N.E.2d 810, 814 (1974) (giving tacit approval to the broad evidence rule); *McAnarney v. New York Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902, 905 (1928) (landmark decision originating the broad evidence rule). The court analyzed four methods utilized in other jurisdictions to make ACV determinations: (1) replacement cost without depreciation, (2) market value, (3) replacement cost with depreciation deduction, and (4) broad evidence rule. 442 N.E.2d at 354-56.

<sup>62</sup>442 N.E.2d at 356.

<sup>63</sup>*Id.* at 357.

<sup>64</sup>*Id.* at 356-57. *Travelers'* language may be construed as adopting the broad evidence rule for all property loss cases. When so construed, it is consistent with *Ohio Cas. Ins. Co. v. Ramsey*, 439 N.E.2d 1162 (Ind. Ct. App. 1982), which applied the rule in a total loss property case. The court of appeals in *Ohio Casualty*, however, referred by footnote to a suggestion that "replacement cost less depreciation" should be the touchstone in the ordinary property loss case, thus limiting the broad evidence rule to those unusual fact situations wherein greater flexibility is needed to make an ACV determination. 439 N.E.2d at 1169 n.4.

<sup>65</sup>440 N.E.2d 751 (Ind. Ct. App. 1982).

<sup>66</sup>The trial court rejected *Fuston's* tendered instruction which stated:

If you find that one of the defendants committed an act which would void the terms of the insurance policy but that the other defendant was innocent of any such act, you should return a verdict against the one defendant and a verdict for the other defendant.

*Id.* at 752.

with respect to “an insured” who was guilty of failure to protect the property.<sup>67</sup> The Indiana Court of Appeals, citing the equitable principle that a party will not be permitted to profit from his wrongdoing, concluded that a culpable spouse’s conduct dissolves the tenancy by the entirety and permits an innocent spouse to recover one-half of the insurance proceeds.<sup>68</sup> The court acknowledged that in some cases such a division of benefits might permit the wrongful spouse to enjoy part of the proceeds but stated that trial courts are competent to fashion remedies that would avoid that result.<sup>69</sup>

*Fuston* clearly expanded the holding of *American Economy Insurance Co. v. Liggett*,<sup>70</sup> which permitted full recovery of the insurance proceeds by an innocent spouse where the wrongful spouse had perished during the destruction of the insured property. Yet, *Fuston* left unanswered what “other remedies” are authorized to limit the culpable surviving spouse from receiving part of the insurance proceeds. The court did not directly address whether its holding will affirm the right of an innocent non-related co-insured to insurance proceeds on property destroyed by a culpable co-insured, but it noted the Delaware Supreme Court’s dictum that in such circumstances recovery would be allowed.<sup>71</sup> *Fuston* did, however, send a significant signal to the insurance industry that policy modifications which explicitly exclude an innocent co-insured from any recovery under a homeowner’s policy might be upheld under court challenge.<sup>72</sup> Finally, the court in *Fuston* stated that the innocent co-insured must be totally free of collusion with the guilty spouse or be precluded from recovering any part of the insurance proceeds.<sup>73</sup>

4. *Pro Rata Contributions Between Property Insurers.*—In *Indiana Insurance Co. v. Sentry Insurance Co.*,<sup>74</sup> both insurers issued policies on property that had been sold on contract. Sentry insured the vendee and Indiana insured the vendor to that contract. Each policy provided that its insurer would be pro rata liable with all other insurers of the property. After the property was destroyed by fire, Indiana denied coverage liability and refused to pay its pro rata share of the loss. Affirming an adverse judgment for Indiana Insurance, the Indiana Court of Appeals stated that before a pro rata contribution will be required, each policy must insure (1) the same parties, (2) the same casualty, (3) the same property, and (4) the same insured interest.<sup>75</sup> Concluding that the

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<sup>67</sup>*Id.* at 751-52 n.l.

<sup>68</sup>*Id.* at 753-54.

<sup>69</sup>*Id.* at 754.

<sup>70</sup>426 N.E.2d 136 (Ind. Ct. App. 1981).

<sup>71</sup>440 N.E.2d at 754 (citing *Steigler v. Insurance Co. of N. America*, 384 A.2d 398 (Del. 1978)).

<sup>72</sup>440 N.E.2d at 754.

<sup>73</sup>*Id.*

<sup>74</sup>437 N.E.2d 1381 (Ind. Ct. App. 1982).

<sup>75</sup>*Id.* at 1388 (citing *Granite State Ins. Co. v. Employers Mut. Ins. Co.*, 125 Ariz.

first three elements could not be disputed, the court addressed Indiana's argument that only the vendee's interest had been destroyed and therefore the risk of loss must be borne solely by the vendee in possession.<sup>76</sup> Rejecting this position, the court stated:

Although it is true that in an action between the vendee and the vendor the vendee would usually bear the risk of loss, this legal principle is irrelevant in the instant case. To hold otherwise would state that when the vendee bears the risk of loss (which is usually the case), the insurer of the vendor's interest would never pay for a loss even though it accepted the premiums from the vendor; the vendee would then become the insurer and the insurance company would be relieved of its role as insurer and allowed to reap the windfall of the premiums it collected from the vendor.<sup>77</sup>

Additionally, the court acknowledged the right of a co-insurer to bring an action to enforce a pro rata contribution.<sup>78</sup> The court stated that the non-participating insurer would be required to pay its pro rata share even though it did not participate in the claim adjustment<sup>79</sup> and would further be barred from challenging the adjustment.<sup>80</sup>

5. *Mortgagor-Mortgagee Rights to Proceeds Resulting from Losses to Mortgaged Premises.*—Two cases addressed the right of a mortgagor to have insurance proceeds applied to restoration and repair of the mortgaged premises as opposed to the mortgage debt. In *Hoosier Plastics v. Westfield Savings & Loan Association*,<sup>81</sup> American Color (mortgagor)

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275, 609 P.2d 90 (Ariz. Ct. App. 1980); *Emmco Ins. Co. v. Indiana Farmers Mut. Ins. Co.*, 152 Ind. App. 212, 283 N.E.2d 404 (1972)).

<sup>76</sup>437 N.E.2d at 1388.

<sup>77</sup>*Id.* (footnote omitted).

<sup>78</sup>*Id.* at 1390 (citing *Ohio Cas. Group of Ins. Cos. v. Royal-Globe Ins. Cos.*, 413 N.E.2d 678 (Ind. Ct. App. 1980)).

<sup>79</sup>437 N.E.2d at 1390.

<sup>80</sup>*Id.* The court cited with approval the language of *Massachusetts Bonding & Ins. Co. v. Car & Gen. Ins. Corp.*, 152 F. Supp. 477 (E.D. Pa. 1957) which stated:

"The protection which law and equity afford a co-insurer is available only to a co-insurer which recognizes its liability and participates in assuming charge of the matters relating to the claim involving its insured and its co-insurer. If the defendant had performed its obligation, it would have joined in the negotiations for settlement or, disapproving settlement, would have joined in the defense of any suit against Johnson; it would not have thrust sole responsibility upon the plaintiff. When the defendant falsely disclaimed, and refused to undertake or perform its obligations it lost its rights to complain that the plaintiff [the other insurer] undertook the obligations of both in the common, as well as its own, interest."

437 N.E.2d at 1390 (quoting *Massachusetts Bonding & Ins. Co. v. Car & Gen. Ins. Corp.*, 152 F. Supp. 477, 480-81 (E.D. Pa. 1957)).

<sup>81</sup>433 N.E.2d 24 (Ind. Ct. App. 1982).

mortgaged property to Westfield (mortgagee). A building on the mortgaged premises was destroyed by fire and a dispute arose as to the proper application of insurance proceeds payable under a policy obtained by the mortgagee pursuant to the mortgage agreement. The mortgage agreement required that the mortgagor obtain an insurance policy on the mortgaged property which contained a clause making any loss payable to the mortgagee as its "interest may appear." The agreement further provided that insurance proceeds should first be applied to restoration or repair of the premises so long as such repair was economically feasible and the mortgagee's security interest was not impaired.<sup>82</sup>

The court stated that the policy language, as its "interest may appear," generally entitles the mortgagee to apply policy proceeds to the mortgage debt.<sup>83</sup> The insurance proceeds therefore substitute for the property as security and act as an equitable conversion of the property.<sup>84</sup> Thus, the mortgagee will normally prevail over a mortgagor who desires to apply the proceeds to repair and restoration of the property.<sup>85</sup> The parties to a mortgage agreement however can change that result by contracting to apply the proceeds to restoration rather than the mortgage debt.<sup>86</sup> Thus, the court upheld the right of the mortgagor to apply the proceeds towards restoration where the mortgage provides for such application.<sup>87</sup>

The Indiana courts also addressed this issue in *Loving v. Ponderosa Systems, Inc.*<sup>88</sup> In that case, the mortgage agreement provided that insurance proceeds be applied to the mortgage debt or alternatively, at the mortgagee's election, to restoration of the damaged premises. The court stated that the mortgagee's interest is in the debt only.<sup>89</sup> Further, although the court agreed with *Hoosier Plastics* that the mortgagee may, by agreement, require the application of the proceeds to restoration, the court found no language in the agreement mandating such application.<sup>90</sup> Thus, the mortgagor's lessee was held responsible for the full cost of repair to the extent insurance proceeds were not made available by the mortgagee.<sup>91</sup>

These cases therefore illustrate the flexibility the parties have to alter traditional risk of loss principles with respect to mortgaged properties and the importance of specifying the manner of insurance proceed disbursement in the event that property is destroyed.

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<sup>82</sup>*Id.* at 26-27.

<sup>83</sup>*Id.* at 27.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 28.

<sup>88</sup>444 N.E.2d 896 (Ind. Ct. App. 1983).

<sup>89</sup>*Id.* at 906 (citing *Pearson v. First Nat'l Bank*, 408 N.E.2d 166 (Ind. Ct. App. 1980)).

<sup>90</sup>444 N.E.2d at 907.

<sup>91</sup>*Id.*

### C. Life, Accident and Health Insurance

1. *Rights of an Insured Under a Conversion Policy.*—In *Sur v. Glidden-Durkee*,<sup>92</sup> a former employee of Glidden-Durkee was covered by a group health insurance policy provided by Prudential during the term of his employment. Prior to Sur's voluntary termination of employment, he discussed with an employer representative his right to convert the group policy to an individual policy, as permitted by Prudential's employee benefit booklet. Sur was informed that he could convert to an individual health plan within a specified number of days following the termination of his employment. Subsequent to terminating that employment, Sur's wife gave birth to a severely deformed child who required extensive surgery and medical care. Upon examining the conversion policies available, Sur discovered that none provided for major medical coverage as he had been provided under the group policy. Faced with assuming the great bulk of his son's medical expenses, Sur brought an action against his employer and Prudential for benefits available under the major medical plan. He alleged that he had been misled into believing major medical would be provided in one of the conversion policies primarily because he had not been informed that such coverage was not available under the conversion plans. Sur admitted that he had failed to inquire about major medical benefits and that the defendants had not affirmatively misrepresented that major medical could be obtained upon conversion. The district court granted summary judgment for both Glidden-Durkee and Prudential. The Seventh Circuit Court of Appeals reversed, holding that a material issue of fact existed as to whether Sur had been misled by Glidden-Durkee's agent or Prudential's booklet.

The Seventh Circuit stated that an employer is not an agent for an insurer and representations made by that employer will not be imputed to the insurer.<sup>93</sup> Rather, the employer who negotiates a group insurance contract acts as the employees' agent<sup>94</sup> and therefore owes a duty of good faith and diligence in both obtaining adequate insurance for its employees and informing those employees of conversion rights under the group policy.<sup>95</sup> This duty to inform includes a duty to avoid misleading an employee with respect to his conversion rights.<sup>96</sup> The court concluded that failure to notify an employee of *substantial* dissimilarities between the group plan and the conversion policy might result in a breach of the duty to inform.<sup>97</sup> Noting that major medical constituted approximately ninety percent of the benefits paid under the group plan,<sup>98</sup> the court determined

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<sup>92</sup>681 F.2d 490 (7th Cir. 1982).

<sup>93</sup>*Id.* at 493.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 494 (citing *Sheller-Globe Corp. v. Sheller*, 413 N.E.2d 318 (Ind. Ct. App. 1980)).

<sup>96</sup>681 F.2d at 494.

<sup>97</sup>*Id.* at 495.

<sup>98</sup>*Id.* at 499.

that a trier of fact might find a breach of the employer's fiduciary duties as agent for the insured.<sup>99</sup> Therefore, summary judgment was improper as to Glidden-Durkee.

The court next stated that an insurer will be estopped to deny coverage when the employee has reasonably relied upon the insurer's act or omission.<sup>100</sup> The court determined that Prudential's benefit booklet failed to state affirmatively that major medical would not be provided with the conversion policies.<sup>101</sup> Therefore, it reversed the award of summary judgment concluding that reasonable men might differ on whether the booklet misled Sur and thus, whether Prudential should be estopped to deny major medical benefits.<sup>102</sup>

In *Commonwealth Life Insurance Co. v. Jackson*,<sup>103</sup> a family protection rider was added to a life insurance policy which insured the wife and children for \$1,000 each and permitted the children to convert that policy into individual policies at age twenty-five with additional evidence of insurability. The family protection policy contained a suicide clause denying death benefits for suicides committed within two years from the date of issue. One of the children exercised the conversion privilege and a converted policy was issued. The converted policy also contained a clause denying benefits for suicides committed within two years from the "date of issue."<sup>104</sup> The insured child committed suicide more than two years after the original family protection policy was issued but less than two years from the time of conversion. Benefits were denied because of the suicide clause. The insured claimed the two-year time period mentioned in the converted policy should be computed from the time when the family protection rider was issued, not from the date the converted policy was issued. An action was initiated to enforce payment of the death benefit. The trial court granted summary judgment for the insured and the judgment was affirmed on appeal.

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<sup>99</sup>*Id.* at 495.

<sup>100</sup>*Id.* The court stated that detrimental reliance could be supported by Sur's failure to seek health insurance elsewhere. *Id.* at 495 n.12.

<sup>101</sup>*Id.* at 499. The court further stated:

The most significant feature of the conversion provision, however, is that nowhere does it state that Major Medical coverage is not available upon conversion. . . . [W]e think a rational jury could readily conclude that, in informing employees that a conversion policy is "available," while neglecting to inform them that the conversion policy covers only a small percentage of the group policy's maximum coverage, the booklet is materially misleading. This is particularly true in light of the Indiana courts' insistence that an insurance company articulate with utmost clarity those risks that it does not intend to insure against in the policies it holds out for sale.

*Id.* (citations omitted).

<sup>102</sup>*Id.*

<sup>103</sup>432 N.E.2d 1382 (Ind. Ct. App. 1982).

<sup>104</sup>*Id.* at 1384.



The issue before the appellate court was whether the subsequent conversion policy was a separate and independent contract or a continuation of the original policy. The court quoted a Georgia case for the general rule:

"It is generally held that when a policy of life insurance is canceled or surrendered and replaced by a new agreement, the new policy does not create a new contract of insurance, but effects a continuance of the original contract so that the liability of the insurer for death by suicide is not affected by the fact that death occurred within the period specified in the new policy's suicide clause. If the new policy is so different as to constitute an entirely new agreement the original suicide clause is inapplicable; but where the latter is identical or at least substantially similar to the old policy, it is usually held that the policies should be considered as one agreement."<sup>105</sup>

The court noted that the conversion policy depended strictly upon the original policy for its existence and that the insured applied for the conversion policy on a form provided for that purpose.<sup>106</sup> Further, the court stated that enforcement of a two-year suicide clause in a converted policy would not foster the anti-fraud bases for suicide clauses.<sup>107</sup> Since the benefits accruing under the conversion policy were clearly fixed by the original policy, the court concluded that both policies must be construed as one agreement and the suicide clause must fail.<sup>108</sup>

2. *Definition of "Child" as Beneficiary Under a Life Insurance Policy.*—In *Aetna Life & Casualty Insurance Co. v. Stapleton*.<sup>109</sup> a decedent had designated his surviving "children" as beneficiaries under a group life insurance policy and several illegitimate children claimed a right to the proceeds. Because an insurance policy is a contract, the court determined that contract and not probate principles should govern the interpretation of "child" under the policy.<sup>110</sup> The court concluded that the

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<sup>105</sup>*Id.* at 1388 (citations omitted) (quoting *Founders Life Assurance Co. v. Poe*, 242 Ga. 748, 750, 251 S.E.2d 247, 249 (1978)).

<sup>106</sup>*Id.* at 1391. The court additionally noted that the application contained no questions relating to insurability or physical examination and that Commonwealth backdated the date of issue in order to provide continuous coverage under the old policy. *Id.*

<sup>107</sup>The court stated that

[i]f the function of the short term suicide clause is merely to serve as an anti-fraud provision . . . where evidence of insurability is waived and where a party is led to believe he is effecting a conversion . . . rather than purchasing an entirely new policy the suicide clause of the second policy would not be given effect.

*Id.*

<sup>108</sup>432 N.E.2d 1382. See *Occidental Life Ins. Co. v. Hurley*, 513 S.W.2d 897 (Tex. Civ. App. 1974); *Western & S. Life Ins. Co. v. Shelby*, 101 Ind. App. 1, 194 N.E. 197 (1935).

<sup>109</sup>556 F. Supp 228 (S.D. Ind. 1982).

<sup>110</sup>*Id.* at 230.

plain meaning of “child” includes all offspring, both legitimate and illegitimate.<sup>111</sup> Therefore, the illegitimate children were held to fall within the class of beneficiaries contemplated by the insured decedent when he contracted for the life insurance.<sup>112</sup>

*D. Casualty Insurance: Statute of Limitations  
in Uninsured Motorist Cases*

In this survey period, the Indiana courts finally addressed the issue of whether the two-year statute of limitations for tort actions or a shorter limitation period specified in an insurance contract is applicable in uninsured motorist cases. In *Scalf v. Globe American Casualty Co.*,<sup>113</sup> the insured failed to file his claim within one year of loss as required by the uninsured motorist portion of his policy.<sup>114</sup> The insured's claim was denied and judgment was entered for the insurer on the insured's action to enforce that claim. Reversing that judgment, the appellate court determined that the legislature intended the uninsured motorist statute to afford an insured the same protection against loss as he would have enjoyed had the offending motorist been insured.<sup>115</sup> Since an insured has two years to bring an action against an insured offender, the one-year contractual limitation diminished the rights intended by statute and therefore was contrary to public policy.<sup>116</sup> The court in *Scalf* clearly endorsed the two-year tort statute of limitations as a minimum coverage period in uninsured motorist cases.<sup>117</sup>

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<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>442 N.E.2d 8 (Ind. Ct. App. 1982).

<sup>114</sup>The policy provided:

*Action Against the Company:* No suit or action whatsoever or any proceeding instituted or processed in arbitration shall be brought against the company for the recovery of any claim under this coverage unless as a condition precedent thereto, the insured or his legal representative has fully complied with all of the terms of the policy and unless same is commenced within twelve months next after the date of the accident.

*Id.* at 9 n.3.

<sup>115</sup>*Id.* at 10.

<sup>116</sup>*Id.*

<sup>117</sup>The court stated:

Thus to provide Scalf with the same financial protection he would have had if he were injured by an insured motorist, he must be able to pursue his remedy against his insurance carrier for the same time period he would be able to pursue his claim against an insured tortfeasor's insurance carrier. Enforcement of the contractual one-year limit in the uninsured motorist provision would place Scalf in a substantially different position than he would have been if the tortfeasor had carried the required coverage.

*Id.* at 11. See *Bocek v. Inter-Insurance Exch. of Chicago Motor Club*, 175 Ind. App. 69, 369 N.E.2d 1093 (1977).

### E. Statutory Developments

The General Assembly passed a number of laws impacting on the insurance industry during the survey period.<sup>118</sup>

1. *Indiana Public Adjuster Statute*.—A new Indiana Public Adjuster statute<sup>119</sup> was enacted to address the constitutional infirmities cited by the Indiana Supreme Court in *Professional Adjusters, Inc. v. Tandon*.<sup>120</sup> Under the old legislation, the public adjuster was authorized to *represent* an insured in the adjustment of claims for loss under any policy of insurance covering real or personal property except an auto policy.<sup>121</sup> This authorization included the power to negotiate and effect settlement of the insured's claim.<sup>122</sup> The court concluded that the public adjuster's conduct of interpreting contracts, assessing damage, and assisting the insured in negotiation and settlement of claims, constituted the unauthorized practice of law.<sup>123</sup>

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<sup>118</sup>Legislation enacted which impacted upon the insurance industry included the following: Act of Apr. 4, 1983, Pub. L. No. 261-1983, §§ 1-5, 1983 Ind. Acts 1695, 1695-96 (codified at IND. CODE §§ 27-8-9-5 to -9 (Supp. 1983)) (repealing IND. CODE §§ 27-8-9-1 to -4 (1982)) (owner's policy will be considered primary, unless damage occurs when the vehicle is left with a business that stores, repairs, tests, sells or parks automobiles, or under a car rental agreement, the lessee agrees to insure his liability while operating the vehicle in determining which motor vehicle liability policy must be exhausted first when two or more collectible policies apply to the insured loss); Act of Apr. 11, 1983, Pub. L. No. 256-1983, § 1, 1983 Ind. Acts 1656, 1656 (codified at IND. CODE § 27-1-13-14 (Supp. 1983)) (permitting insurer to sell group casualty and liability insurance to two or more qualified public transportation agencies for the purpose of insuring their public transportation functions); Act of Apr. 13, 1983, Pub. L. No. 260-1983, §§ 1, 3, 1983 Ind. Acts 1679, 1679-83 (codified in part at IND. CODE §§ 27-1-9-12, 27-6-1.1-1 to -6 (Supp. 1983)) (repealing IND. CODE §§ 27-1-7-18, 27-1-9-7, 27-6-1 (1982)) (addressing regulation of reinsurance risks by domestic insurance companies and revises references to reinsurance); Act of Apr. 5, 1983, Pub. L. No. 258-1983, § 1, 1983 Ind. Acts 1665, 1665-69 (codified at IND. CODE § 27-2-9-3 (Supp. 1983)) (expanding power of Indiana domestic insurance companies to form subsidiaries and giving the Insurance Commissioner additional regulatory power over these subsidiaries).

<sup>119</sup>Act of Apr. 4, 1983, Pub. L. No. 257-1983, § 1, 1983 Ind. Acts 1657, 1657-64 (codified at IND. CODE §§ 27-1-27-1 to -11 (Supp. 1983)). (repealing IND. CODE §§ 27-1-24-1 to -9 (1982)).

<sup>120</sup>433 N.E.2d 779 (Ind. 1982).

<sup>121</sup>See *id.* at 782 (interpreting IND. CODE §§ 27-1-24-1 to -9 (1982)).

<sup>122</sup>IND. CODE § 27-1-24-1(a) (1982). The statute authorized the public adjuster to act "on behalf of" or aid "in any manner" an insured in negotiating or settling a claim. *Id.*

<sup>123</sup>433 N.E.2d at 783. The court implied that the statute might withstand a constitutional attack if it limited an adjuster's authority to appraise the loss and report back to the insured the fair value of the claim, provided that the adjuster refrained from negotiating or settling the insured's claim. *Id.* at 782.

A strong dissent, written by Justice Hunter, challenged the majority's distinction between private and public adjusters. *Id.* at 784 (Hunter, J., dissenting). The dissent noted that public adjusters perform identical functions to those performed by insurance adjusters and as such, if public adjusters engage in the unauthorized practice of law, so do private insurance adjusters. *Id.* at 784-85. It further cited statutory language limiting the conduct of an adjuster in recommending legal courses of action to an insured, representing an insured who is represented by an attorney, or referring an insured to a particular legal counsel. *Id.* at 786. Finally, the dissent concluded that public policy favors giving an insured the

The new legislation is thus an obvious legislative attempt to salvage the remnants of the public adjuster concept. It only authorizes the public adjuster to *render advice or assistance* in the adjustment of claims.<sup>124</sup> Further, it specifically prohibits a public adjuster from engaging in the “practice of law.”<sup>125</sup> Finally, the statute expands the powers of the Insurance Commissioner to monitor and punish wrongful conduct by a public adjuster.<sup>126</sup>

The amended legislation therefore significantly limits the public adjuster’s authority to assist in any negotiation or claim settlement on behalf of an insured. Whether these limitations will be sufficient to withstand further constitutional attack is uncertain for the Act still fails to define what actions constitute the “practice of law” or the scope of the adjuster’s authority to “advise or assist” in the adjustment of claims.

2. *Unfair Claim Settlement Practices.*—The legislature further added a new fourteen-point section to the insurance code dealing with unfair claim settlement practices.<sup>127</sup> That section enumerates numerous unauthorized practices which might result in penalties against an insurance company. It provides minimum standards for the insurance industry in its dealings with an insured to include standards for disclosure of coverage provisions, the appropriate procedure for responding to an insured’s claim, and the proper standard for investigation, evaluation, and settlement of an insured’s claim.<sup>128</sup>

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same right to non-legal assistance in the settlement of insurance claims as presently enjoyed by the insurance industry. *Id.* at 787.

<sup>124</sup>IND. CODE § 27-1-27-1(a) (Supp. 1983).

<sup>125</sup>*Id.* § 27-1-27-9.

<sup>126</sup>*Id.* § 27-1-27-7.

<sup>127</sup>Act of Apr. 19, 1983, Pub. L. No. 259-1983, § 2, 1983 Ind. Acts 1669, 1675-76 (codified at IND. CODE § 27-4-1-4.5 (Supp. 1983)).

<sup>128</sup>Those unauthorized practices are as follows:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information.
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.
- (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.
- (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (9) Attempting to settle claims on the basis of an application which was altered

Significantly, the legislation crosses over all areas of insurance law.<sup>129</sup> It vests the Insurance Commissioner with new authority for enforcement of the code and establishes stringent monetary penalties for unfair claim settlement practices.<sup>130</sup> Unfortunately, the act is vague, ambiguous and lacks sufficient specificity to put an insurer on notice of the exact conduct prohibited. Terms such as "promptly settle," "provide reasonable explanation," and "reasonable standards" provide little if any standard upon which the insurance industry can structure its course of dealings with an insured.

Further, the Act opens the door for new challenges to the substantive and evidentiary restrictions imposed by the Indiana courts for punitive damage awards. The new section provides that a failure to properly communicate, investigate, or settle claims constitutes an unfair settlement practice. This language will undoubtedly result in a re-examination of recent court decisions reversing punitive damage awards for similar "unintentional" conduct by the insurer. On the other hand, the commissioner's authority to impose monetary penalties upon carriers who violate the unfair settlement practices prohibitions might operate to bar punitive damages entirely if the courts apply the general rule that punitive damages are improper when other monetary sanctions might be imposed.

3. *Comparative Fault Act*.—Finally, the legislature enacted a comparative fault act<sup>131</sup> during this survey period. The Act provides, in part, that a percentage of fault must be assigned to the plaintiff when comparative fault is at issue.<sup>132</sup> Fault greater than fifty percent will bar the plaintiff's recovery as did the defense of contributory negligence.<sup>133</sup>

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without notice to, or knowledge or consent of, the insured.

(10) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made.

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(12) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

IND. CODE § 27-4-1-4.5 (Supp. 1983).

<sup>129</sup>*Id.* § 27-4-1-4.

<sup>130</sup>*Id.* §§ 27-4-1-6, -12.

<sup>131</sup>Act of Apr. 21, 1983, Pub. L. No. 317-1983, § 1, 1983 Ind. Acts 1930, 1930-33 (codified at IND. CODE § 34-4-33-1 to -8 (Supp. 1983)).

<sup>132</sup>IND. CODE § 34-4-33-5(1) (Supp. 1983).

<sup>133</sup>*Id.* § 34-4-33-5(2).

The Act is mentioned here because of the tremendous impact it will ultimately have on the adjustment and settlement of insurance claims.<sup>134</sup> No longer faced with the devastating contributory negligence defense, settlement opportunities for plaintiffs should increase since the likelihood of plaintiffs recovering some part of their claim at trial will be substantially greater.

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<sup>134</sup>For a more in depth discussion of the Comparative Fault Act, see *Symposium on Indiana's Comparative Fault Act*, 17 IND. L. REV. NO. 3 (1984).



## IX. Labor Law

EDWARD P. ARCHER\*

### A. *Public Employee Representation Fee or Agency Shop Clauses*

The most controversial subject of court decisions during the survey period was the collection of representation fees from nonunion public employees. In *Fort Wayne Education Association v. Goetz*,<sup>1</sup> the Indiana Court of Appeals for the Fourth District held that school boards can recognize a teachers' union's claim for representation fees from nonunion teachers.<sup>2</sup> In that case, the Fort Wayne Community Schools had recognized such a claim when it contracted with the Fort Wayne Education Association to provide for nonmandatory payroll deductions of representation fees from nonunion teachers. The contract provided that nonunion teachers' dues would be slightly less than regular membership dues to exclude amounts charged for political activities.<sup>3</sup> It also authorized the union to bring suit to collect its fees from teachers who refused to authorize a payroll deduction or otherwise refused to pay.<sup>4</sup> Pursuant to that authority, the union brought suit in small claims court against refusing teachers.<sup>5</sup> The teachers asserted that the representation fee requirement was an unconstitutional infringement on their first amendment right to freedom of association.<sup>6</sup>

The court of appeals recognized that the first and fourteenth amendments give public school teachers the right to choose whether to associate for the advancement of particular beliefs.<sup>7</sup> However, the court concluded that the contract did not infringe upon this right because it did not require nonunion teachers to join the union, but merely required them to "carry their financial burden in return for the benefits they receive from the Association's activities as their exclusive representative."<sup>8</sup>

The court also determined that the union's authority for imposing a representation fee upon nonunion teachers must originate with the state legislature. Citing *Abood v. Detroit Board of Education*<sup>9</sup> and equating

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<sup>1</sup>443 N.E.2d 364 (Ind. Ct. App. 1982).

<sup>2</sup>*Id.* at 373.

<sup>3</sup>*Id.* at 365.

<sup>4</sup>*Id.* at 367.

<sup>5</sup>*Id.* at 365.

<sup>6</sup>*Id.* at 366.

<sup>7</sup>*Id.* at 368 (citations omitted).

<sup>8</sup>*Id.*

<sup>9</sup>431 U.S. 209 (1977).



the imposition of such fees with the creation of agency shops, the court stated that "[t]his justification for agency shops, however, is of no avail unless authorized by statute because our General Assembly has particularly prescribed the regulation of teachers' labor relations."<sup>10</sup> The court noted that the Indiana General School Powers Act<sup>11</sup> allows school corporations to prepare rules and regulations for the governance of employees.<sup>12</sup> Based upon this statutory power, which must be "liberally construed to permit the governing body of school corporations to conduct its affairs in a manner consistent with sound business practice,"<sup>13</sup> the court concluded that the Legislature had endowed Indiana school boards with wide discretion, including the discretion to consent to the nonmandatory payroll deduction of fees.<sup>14</sup>

The court also examined the Certified Educational Employee Bargaining Act (CEEBA)<sup>15</sup> to determine its effect on the board's authority to consent to the fee requirement. In its preface CEEBA recognizes the right of school employees to organize and accepts collective bargaining as conducive to harmonious working relationships.<sup>16</sup> The court noted that under CEEBA, while only salary, wages, hours, and related fringe benefits are mandatory subjects of *bargaining*, working conditions are a mandatory subject of *discussion*. Acknowledging that a standard agency shop clause is a condition of employment, the court narrowly construed the CEEBA provision that declared encouraging or discouraging membership in any employee organization constitutes an unfair labor practice.<sup>17</sup> This provision, the court concluded, does not prohibit a school corporation from recognizing a teachers' union's right to compel payment of representation fees.

The court distinguished the Fort Wayne clause from the clause at issue in *Anderson Federation of Teachers, Local 519 v. Alexander*.<sup>18</sup> That clause was invalid because it conditioned employment upon payment of service fees—teachers failing to pay were subject to discharge.<sup>19</sup> The court noted:

"[we do not] suggest that such agreements between schools and teachers' unions are invalid *per se*. We say only that construing

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<sup>10</sup>443 N.E.2d at 369. The *Goetz* court also quoted the following language from the *Abood* decision: "A union-shop arrangement has been thought to distribute fairly the cost of [representing the interests of employees] among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' . . . ." 443 N.E.2d at 369 (quoting 431 U.S. at 221-22).

<sup>11</sup>IND. CODE §§ 20-5-2-1 to -5 (1982).

<sup>12</sup>*Id.* § 20-5-2-2(17).

<sup>13</sup>*Id.* § 20-5-6-3.

<sup>14</sup>443 N.E.2d at 370.

<sup>15</sup>IND. CODE §§ 20-7.5-1-1 to -14 (1982).

<sup>16</sup>*Id.* § 20-7.5-1-1(b).

<sup>17</sup>443 N.E.2d at 370-71.

<sup>18</sup>416 N.E.2d 1327 (Ind. Ct. App. 1981).

<sup>19</sup>443 N.E.2d at 372.

the provisions of the CEEBA *in toto*, they forbid school corporations to make *any* collective bargaining agreement—for union security purposes or otherwise—in which the schools undertake the mandatory discharge of a given class of teachers.”<sup>20</sup>

The court also examined the legislative history of CEEBA and decided that the Legislature intended to allow a school corporation to recognize representation fees. The House voted to amend the Senate Bill to make unlawful an agreement which requires a person “to become a member of or . . . to pay money to the organization in lieu of membership as a condition of employment,”<sup>21</sup> but this amendment was not made part of the law as enacted.<sup>22</sup>

The court thus held that the school board and the union had the power to negotiate the representation fee clause.<sup>23</sup> The court limited its holding to fees for bargaining unit services, noting that the nonunion teachers could not be required to pay for the union’s political activities.<sup>24</sup>

The United States District Court for the Northern District of Indiana also addressed the legality of agency shop provisions, but for city employees, in *Perry v. City of Fort Wayne*.<sup>25</sup> The agency shop clause in *Perry* required all employees, including nonunion members, to pay to the union as a condition of employment an agency fee equal in amount to union dues. When the plaintiff was terminated for failing to pay this fee, she sought a temporary restraining order to enjoin the city from conditioning her employment on full payment of the agency fee. The plaintiff alleged violations of her first and fourteenth amendment rights. She argued that the agency shop clause was unconstitutional on its face, and that even if the agency fee requirement was valid, she could not be required to pay any amount not germane to collective bargaining.<sup>26</sup>

The court concluded that the plaintiff would probably be able to show that the agency shop provision infringed upon her first amendment rights and ordered the requested relief upon that ground.<sup>27</sup> The district court based its conclusion on the Supreme Court’s decision in *Abood* which had permitted infringement upon first amendment rights by agency shop agreements only because the state legislature had declared that such

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<sup>20</sup>*Id.* (quoting *Anderson Fed’n of Teachers, Local 519 v. Alexander*, 416 N.E.2d 1327, 1333 (Ind. Ct. App. 1981)).

<sup>21</sup>443 N.E.2d at 373 (emphasis added) (quoting Indiana House Journal, 1973 Regular Sess. 1212 (1973)).

<sup>22</sup>443 N.E.2d at 373.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* The parties had stipulated to the amount of dues used for political activities.

<sup>25</sup>542 F. Supp. 268 (N.D. Ind. 1982).

<sup>26</sup>*Id.* at 270.

<sup>27</sup>*Id.* at 273 n.6.

agreements furthered the state's strong and legitimate interest in peaceful labor relations. Without such a legislative determination, the court concluded, the agency shop provision would not have survived constitutional scrutiny.<sup>28</sup> The court noted that it had not been shown any Indiana statute that explicitly provided for agency shop agreements for city employees<sup>29</sup> and rejected the city's argument that the Home Rule Act<sup>30</sup> was such a statute. The court reasoned that the Home Rule Act does not fulfill the *Abood* requirement for a specific state determination that such agreements are important to labor relations because it does not constitute an affirmative expression of state policy.<sup>31</sup>

The contrast between *Goetz* and *Perry* is significant. In *Goetz* the court of appeals held that the broad powers granted to school boards under the School Powers Act and CEEBA, which authorizes bargaining for teachers and lists working conditions as a mandatory subject of discussion, constituted sufficient state endorsement of representation fee clauses under *Abood*. In *Perry*, the district court held that the broad powers granted to cities under the Home Rule Act did not fulfill the *Abood* requirements for a state level endorsement of agency shop provisions for city employees. This is a fine line to draw.

In *Abood*, the state legislature had expressly authorized agreements which required payments of agency shop fees as a condition of employment.<sup>32</sup> In Indiana, neither teachers nor other public employees have any such explicit legislative approval of agency shop or representation fee contractual agreements. Just what form of legislative approval *Abood* requires remains unanswered. The broad powers under the School Powers Act without doubt allow school boards to enter into agreements containing representation fee recognition, but such a delegation does not clearly fulfill whatever requirements *Abood* imposed upon state legislative approval of agency shop clauses. If the School Powers Act satisfies *Abood*,<sup>33</sup> then the broad authority delegated to cities under the Home Rule Act should also constitute state approval of agency shop agreements entered into by the cities.

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<sup>28</sup>542 F. Supp. at 273 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

<sup>29</sup>524 F. Supp. at 273.

<sup>30</sup>IND. CODE §§ 36-1-3-1 to -9 (1982).

<sup>31</sup>*Id.* (citing *Community Communications Corp. v. City of Boulder*, 455 U.S. 40 (1982)). The court's reliance on *City of Boulder* here may be questionable. In *City of Boulder* the United States Supreme Court merely held that cities are not exempt from federal antitrust laws under Congress' "state action" exemption even though they have acted under home rule powers. *Id.* at 56-57. This holding is somewhat remote from the question in *Perry* and could be restricted in future litigation to a mere holding relating to Congress' intent regarding the enforcement of antitrust laws.

<sup>32</sup>431 U.S. at 214 (1977) (citing MICH. COMP. LAWS § 423.210(1)(c) (1978)).

<sup>33</sup>Because the contract in *Goetz* did not condition employment upon payment of the representation fee, this issue has not been decided. However, the reliance upon *Abood* in the court's opinion, see 443 N.E.2d at 369, would tend to indicate that the School Powers Act does provide such a legislative approval.

## B. Teacher Bargaining Limitations Under CEEBA

1. *Nonrenewal of Individual Teacher Contracts.*—In *Indiana Education Employment Relations Board v. Carroll Consolidated School Corp.*,<sup>34</sup> the Indiana Court of Appeals for the Second District addressed the teacher bargaining representative's right to discuss a school board's refusal to renew an individual teacher's contract. Unfortunately, it followed the misguided precedent of *Indiana Education Employment Relations Board v. Board of School Trustees*.<sup>35</sup>

In *Carroll*, the court adopted the *Board of School Trustees* rule that the bargaining representative has no right under CEEBA to discuss a school board's failure to renew an individual teacher's contract.<sup>36</sup> The court avoided the question of whether the general guidelines governing renewal of a teacher's contract would fall within the discussible topic of working conditions under section 5 of CEEBA.<sup>37</sup>

As was thoroughly explained in the 1979 survey,<sup>38</sup> this hypertechnical interpretation of CEEBA unnecessarily leads to undesirable results. In addition, the *Carroll* decision unduly confuses teacher labor relations.

The court in *Carroll* concluded that individual grievances, including failures to renew teacher contracts, should be addressed in a grievance procedure<sup>39</sup> for which the law makes ample provision.<sup>40</sup> This conclusion raises several questions. Must this grievance procedure be negotiated or is it authorized without negotiation by section 2(o) of CEEBA, which provides in pertinent part:

Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of his grievances either individually or through the exclusive representative . . . .<sup>41</sup>

This section appears to specify the grievance procedure, yet the court interpreted it as a "provision in the law for the establishment of a grievance procedure."<sup>42</sup>

The court in *Carroll* also supported its decision with the section 6(b)(4) right of a school to "suspend or discharge its employees in accordance

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<sup>34</sup>439 N.E.2d 737 (Ind. Ct. App. 1982).

<sup>35</sup>174 Ind. App. 481, 368 N.E.2d 1163 (1977).

<sup>36</sup>439 N.E.2d at 739-40.

<sup>37</sup>*Id.* at 739 n.1.

<sup>38</sup>Archer, *Labor Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 215-20 (1979).

<sup>39</sup>439 N.E.2d at 740.

<sup>40</sup>*Id.* at 739 (citing IND. CODE §§ 20-7.5-1-2(o), -4 (1976)).

<sup>41</sup>IND. CODE § 20-7.5-1-2(o) (1982).

<sup>42</sup>439 N.E.2d at 739.

with applicable law”<sup>43</sup> and identified “applicable law” as the since repealed Teacher Tenure Act.<sup>44</sup> That statute required school corporations to notify a non-permanent teacher in writing on or before May 1 that the teacher’s contract would not be renewed and afforded teachers an opportunity to request a written explanation for the dismissal.<sup>45</sup> The *Carroll* school board met those requirements.<sup>46</sup>

The *Carroll* court’s failure to decide whether general guidelines for renewals are discussible raises the serious question of what substantive standards would be applied if a grievance procedure were adopted. If the parties adopted a set of general guidelines, there is no certainty that they would be enforceable.

Even if such general guidelines for nonrenewals were discussible under section 5 of CEEBA,<sup>47</sup> that section further provides that a school employer “shall not be required to bargain collectively, negotiate or enter into a written contract” concerning any discussible topic.<sup>48</sup> A school corporation would not be required to enter into a contract providing general guidelines for renewals unless they were a subject of bargaining under section 4 of CEEBA.<sup>49</sup>

Section 4 expressly provides for grievance procedures culminating in final and binding arbitration, but it also provides that binding arbitration “shall have no power to amend, add to, subtract from or supplement provisions of the contract.”<sup>50</sup> Absent an enforceable contractual limitation on a school employer’s right to renew, the grievance and arbitration procedures would merely be procedures with no enforceable substantive rights. These hollow procedures are what the *Carroll* court intended.

In future litigation, the courts should specifically address the interrelationship between the Teacher Contract Act, the School Powers Act, CEEBA, and grievance and arbitration procedures apparently authorized

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<sup>43</sup>*Id.* (quoting IND. CODE § 20-7.5-1-6(b)(4) (1976)).

<sup>44</sup>439 N.E.2d at 739 (citing IND. CODE § 20-6.1-4-14 (1976), *amended by* Act of Mar. 3, 1978, Pub. L. No. 110, § 6, 1978 Ind. Acts 1085, 1088). If a grievance procedure could be established, its relationship to the Teacher Tenure Act or its successor, the Teacher Contract Act, remains unclear. The interrelationship of the Teacher Contract Act, the General Powers Act, and CEEBA was previously discussed in the 1981 survey, Archer, *Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 413, 427-32 (1981), with reference to *Brown v. Board of School Trustees*, 398 N.E.2d 1359 (Ind. Ct. App. 1980). In *Brown*, the Indiana Court of Appeals concluded that the school corporation could not supplement the Teacher Tenure Act’s procedural safeguards. *Id.* at 1361. Under *Brown*, therefore, the parties could not negotiate any grievance procedure which differed procedurally from the Teacher Tenure Act or its successor, the Teacher Contract Act.

<sup>45</sup>IND. CODE § 20-6.1-4-14 (1976), *amended by* Act of Mar. 3, 1978, Pub. L. No. 110, 1978 Ind. Acts 1085.

<sup>46</sup>439 N.E.2d at 739.

<sup>47</sup>IND. CODE § 20-7.5-1-5(a) (1982).

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* § 20-7.5-1-4.

or created by CEEBA, particularly as these various provisions apply to teacher discharges or nonrenewal of individual teacher contracts.

2. *School Calendar*.—In *Eastbrook Community Schools Corp. v. Indiana Education Employment Relations Board*,<sup>51</sup> the court of appeals addressed whether a school corporation was required to bargain before extending the school calendar to make up excessive snow or emergency days. Although the Eastbrook school board had discussed the school calendar with the teachers' union, it unilaterally provided that days in excess of five to a maximum of ten during which the school was forced to close could be rescheduled at the end of the school calendar and that the teachers would be required to work without additional compensation on such rescheduled days.

The union filed an unfair labor practice complaint, contending that the school board had violated CEEBA by not bargaining about this possible extension of the school calendar. The IEERB affirmed the hearing examiner's finding that the number of teacher work days, including make-up days caused by snow or emergency closings, and the pay for such make-up days were mandatory bargainable items under section 4 of CEEBA because make-up days could affect the number of hours worked and the salary of teachers. Therefore, the IEERB found that Eastbrook's unilateral change concerning a mandatory subject of bargaining constituted an unfair labor practice.<sup>52</sup>

The court of appeals rejected this finding.<sup>53</sup> Section 4 of CEEBA requires a school employer to bargain collectively with the exclusive representative on "salary, wages, hours, and salary and wage related fringe benefits."<sup>54</sup> However, section 6(b) lists as school employer rights the authority to manage and direct the activities of the school corporation, to establish policy, and to implement the mission of the public schools as provided by law.<sup>55</sup>

Indiana's statutory law requires that individual teacher contracts contain "the beginning date of the school term as determined annually by the school corporation"<sup>56</sup> and "the number of days in the school term as determined annually by the school corporation."<sup>57</sup> The court reasoned that:

To conclude that the school board has the exclusive authority to decide both the actual number of days in the school term and the commencement date of this term, but *not* the ending date

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<sup>51</sup>446 N.E.2d 1007 (Ind. Ct. App. 1983).

<sup>52</sup>*Id.* at 1009.

<sup>53</sup>*Id.* at 1012.

<sup>54</sup>IND. CODE § 20-7.5-1-4 (1982).

<sup>55</sup>*Id.* § 20-7.5-1-6(b).

<sup>56</sup>*Id.* § 20-6.1-4-3(a)(3)(A).

<sup>57</sup>*Id.* § 20-6.1-4-3(a)(3)(B).

would be illogical. Therefore, although the legislature may not have clearly stated so, the school board must be held to have the corollary authority to determine when the school session ends.<sup>58</sup>

Buttressing its decision with out-of-state precedent, the court held that school calendars were nonnegotiable matters of educational policy, not mandatory subjects of bargaining under CEEBA, and that the contingency clause in this case did not have enough impact upon salary, wages, hours, and related benefits to mandate bargaining.<sup>59</sup>

The court reserved judgment as to whether requiring teachers to provide services on days other than those contemplated within the normal school year were working conditions which would require discussion because the school board in this case had discussed the provision with the teachers.<sup>60</sup> Consequently, under *Eastbrook*, school calendars and related matters are not bargainable subjects under section 4 of CEEBA.

3. *Deficit Financing*.—In *South Bend Community School Corp. v. National Education Association—South Bend*,<sup>61</sup> the tip of the iceberg appeared revealing problems which may arise in applying section 3 of CEEBA, which provides in part:

It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.<sup>62</sup>

Section 2(q) of CEEBA defines “‘deficit financing’ with respect to any budget year” as meaning “expenditures in excess of money legally available to the employer.”<sup>63</sup>

The South Bend Community School Corporation entered a collective bargaining agreement with the National Education Association-South Bend (NEA-SB) in 1980 which was to terminate at the end of the 1982-83 school year. In the summer of 1981, school officials realized that the corporation was heading for a \$6.8 million deficit. Additional funding narrowed the deficit to \$3.8 million.<sup>64</sup>

In July of 1981, the school superintendent asked the NEA-SB to renegotiate the collective bargaining agreement. When the NEA-SB refused, the school corporation sought a court order declaring that the collective

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<sup>58</sup>446 N.E.2d at 1012.

<sup>59</sup>*Id.* at 1013.

<sup>60</sup>*Id.* at 1013-14.

<sup>61</sup>444 N.E.2d 348 (Ind. Ct. App. 1983).

<sup>62</sup>IND. CODE § 20-7.5-1-3 (1982).

<sup>63</sup>*Id.* § 20-7.5-1-2(q).

<sup>64</sup>444 N.E.2d at 349.

bargaining agreement and individual teacher contracts under that agreement were void under section 3 of CEEBA.<sup>65</sup> Thereafter, the school corporation unilaterally changed the collective bargaining agreement, reducing teachers' wages and cancelling a dental plan. The NEA-SB counterclaimed for a preliminary injunction to prevent the school corporation from implementing these changes. The circuit court granted the injunction and held that the original collective bargaining agreements were valid and binding.<sup>66</sup>

On appeal, the school corporation cited a Pennsylvania case which held that a statute requiring schools to operate within a balanced budget subjected collective bargaining agreements to a condition precedent that funding would be forthcoming from the legislature.<sup>67</sup> The Indiana court distinguished this case by noting that

[u]nlike the Philadelphia school board the Board of Trustees for the South Bend school did not clearly establish where its budget cuts were implemented. The Trustees made nothing more than a bald statement that they had made all feasible budget cuts, and the only expense remaining to be cut was the teachers' salaries.<sup>68</sup>

The court noted that numerous other expenses were involved in the school budget and concluded that the school corporation had not proven that "the teachers' contract was *the expense* within the general fund which 'provides for deficit financing.' "<sup>69</sup>

The court also rejected the contention that section 3 of CEEBA was an unconstitutional impairment of the freedom of teachers to enter contracts, noting that "the Legislature may prohibit contracts against public policy so long as it does not impair previously existing legal contracts after rights have vested"<sup>70</sup> and that "parties entering a contract with a public officer bear the risk of loss if that contract is beyond the scope of the officer's authority."<sup>71</sup>

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<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 350.

<sup>67</sup>*Id.* at 351-52 (citing Philadelphia Fed'n of Teachers, Local No. 3 v. Thomas, 62 Pa. Commw. 286, 436 A.2d 1228 (1981)).

<sup>68</sup>444 N.E.2d at 352.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 352 (citing Gonser v. C.I.T. Fin. Serv., Inc., 16 Bankr. 555 (S.D. Ind. 1981); Pulos v. James, 261 Ind. 279, 302 N.E.2d 768 (1973)).

<sup>71</sup>444 N.E.2d at 353 (citing Board of School Comm'rs v. State *ex rel.* Wolfolk, 209 Ind. 498, 199 N.E. 569 (1936); Honey Creek School Township v. Barnes, 119 Ind. 213, 21 N.E. 747 (1889)).





## X. Products Liability

JOHN F. VARGO\*

### A. Introduction—*The Open and Obvious Danger Rule*

During the last ten years, Indiana products liability law has been greatly influenced by both legislative enactment and increased activity by the Indiana Supreme Court. This survey reviews the 1983 amendments to the Products Liability Act and the significant recent opinions.

The general policy of Indiana products liability law has definitely deviated from the policy considerations which originated strict liability in tort. In 1963, the California Supreme Court adopted strict liability in tort.<sup>1</sup> The nation followed California's lead, and strict liability is now the generally accepted rule. The policies underlying strict liability were compensation of unfortunate victims and promotion of safety in the manufacture and distribution of products.<sup>2</sup> Indiana followed these policies consistently until the recent decision of *Bemis Co. v. Rubush*.<sup>3</sup>

Justice Pivarnik, speaking for a three judge majority in *Bemis*, stated: "In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product."<sup>4</sup> In other words, if the defect in a product is open and obvious, then it is legally impossible for that product to be in a defective condition, unreasonably dangerous to a user.

The open and obvious danger rule is illogical in that a product may be extremely dangerous yet have defects which are quite visible. In light of such dangers, designers have, for over seventy-five years, applied mechanical and electrical guards to such obvious dangers as augers, presses, and rollers. The use of such guards recognizes that the user cannot always protect himself against that which he can see. Without such guards and safety devices, the frequency of maiming injuries to users and workers would increase, and the work place would again become the "sweatshop" of the early industrial revolution.

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<sup>1</sup>*Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

<sup>2</sup>See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119-22 (1960); RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

<sup>3</sup>427 N.E.2d 1058 (Ind. 1981).

<sup>4</sup>*Id.* at 1061.

A simple glance at a common household product should demonstrate the absurdity of the absolute bar to liability for injuries caused by products having open and obvious dangers. For example, a fan, the blades of which are covered by a wire cage, could conceivably be defective and unreasonably dangerous under the *Bemis* holding because its dangerous qualities could be latent or hidden by the presence of the protective cage.<sup>5</sup> But if the wire cage is removed, then the danger becomes open and obvious, and the product is non-defective *as a matter of law* under the *Bemis* decision.<sup>6</sup>

The primary difficulty with the absolute bar of the open and obvious danger rule is that it negates the defect element of a strict liability claim. This effect cannot withstand even a superficial analysis. The rule, if applicable at all, is more appropriate to the defenses of contributory negligence and assumed risk. In such instances, the plaintiff's knowledge (or lack thereof) of the danger and his understanding, appreciation, and voluntariness in encountering the known defect or danger may deprive him of recovery.<sup>7</sup> However, the product does not become less dangerous simply because a particular plaintiff recognizes the danger; the danger is still present for all who may be exposed to it.

Another disturbing facet of the open and obvious danger rule is that it violates the primary motivating principle which gave rise to strict liability in tort and upon which all of tort law is premised—the promotion of safety.<sup>8</sup> When a manufacturer profits from a dangerous product without having to pay for injuries caused by it, he will continue to market the dangerous product. The manufacturer has no incentive to make safer devices or to guard or modify his product so as to reduce the dangers of the product. No prudent manufacturer would desire to increase the cost of his product. Humanitarian pressures to make safer products exert little force in the highly competitive market place.

The failure to recognize the beneficial effect of encouraging safer designs is a rejection of good engineering design practices as recognized by the engineering profession. As every engineer realizes, design choices require considerations of function, economics, and the human element.<sup>9</sup> The human element of design includes considerations of safety and recogni-

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<sup>5</sup>*See id.*

<sup>6</sup>*Id.* at 1064.

<sup>7</sup>Of course, contributory negligence is only a defense in a negligence action and does not apply to strict liability actions. *Gregory v. White Trucking & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975). The assumption of risk defense requires an analysis of the plaintiff's subjective knowledge, understanding, and appreciation of the risk and of his voluntariness in encountering it. *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004 (1978); *see* RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

<sup>8</sup>*See* Prosser, *supra* note 2, at 1119-22.

<sup>9</sup>*See* Severt, *Risk Recognition and Injury Prevention in the Design of Agricultural Equipment 2* (Dec. 13, 1983) (paper presented at the 1983 Winter Meeting of the American Society of Agricultural Engineers).

tion and reduction of unreasonable hazards or dangers in the product.<sup>10</sup> Thus, if a product contains dangers which could be economically eliminated or reduced without impairing the product's function, then such changes should be made.<sup>11</sup> In *Bemis*, an expert design engineer testified as follows:

“[A] hazard or risk in a product is unreasonable if it could be removed and the cost of removal is not significant nor [sic] the cost of removal does not seriously reduce the utility of the product. This is a basic definition. In other words basically in simple words it says if you can get rid of the hazard at little cost you have no business leaving it in, so it is unreasonable to leave it in, and this is, this is the term that we use.”<sup>12</sup>

The three-judge majority in *Bemis*, in examining the design engineer's definition of unreasonably dangerous defect and other engineering testimony, stated:

[Dr. Fox] testified further as to ways in which the machine could have been made safer. Dr. Manos, another expert witness, testified similarly. The jury could have relied on this definition then, and determined that even though the dangerous characteristic of the descending shroud was open and obvious to Rubush as he operated the machine, and known to him, they could find Bemis liable for not conforming to the standards set by Dr. Fox and Dr. Manos. This would make manufacturers insurers [sic] of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana.<sup>13</sup>

The *Bemis* majority thus rejected not only the engineering definition, but also a generally recognized *legal* definition of unreasonably dangerous defect.<sup>14</sup> In so doing, the court refused to recognize safer alternative designs

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<sup>10</sup>*Id.*

<sup>11</sup>See *infra* note 12 and accompanying text.

<sup>12</sup>427 N.E.2d at 1063 (quoting testimony of Dr. Richard L. Fox, Professor of Engineering, Case Western Reserve University).

<sup>13</sup>427 N.E.2d at 1063.

<sup>14</sup>In *Uloth v. City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (1978), the Supreme Judicial Court of Massachusetts stated:

We decline to hold that there can be no negligence in design if the product performs as intended, or if there are warnings found to be adequate, or if the dangers are obvious. We hold that these factors should be considered by a jury in evaluating a claim of design negligence. But there is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery.

*Id.* at 881, 384 N.E.2d at 1193 (citing 2 F. HARPER & F. JAMES, TORTS § 28.5, at 1543 (1958)). See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1963).

as proof of design defects.<sup>15</sup> Consequently, the *Bemis* majority encourages engineers to ignore their customary design considerations of safety. However, the most disturbing effect of *Bemis* is that it encourages unsafe products and unsafe designs and deprives victims of recovery.

### B. *Hoffman v. E.W. Bliss Co.*

1. *Modification of the Open and Obvious Danger Rule.*—In 1964, the Indiana Supreme Court decided a negligence case called *J.I. Case Co. v. Sandefur*,<sup>16</sup> wherein Indiana finally eliminated the privity requirement in negligence law.<sup>17</sup> However, in dicta, the court cited language from a 1950 New York decision, *Campo v. Scofield*,<sup>18</sup> which barred liability unless a defect or danger was hidden from the user.<sup>19</sup> It is important to note two factors regarding *Campo*: first, it was a negligence case;<sup>20</sup> and second, it was overruled in 1976.<sup>21</sup> Despite the apparent inapplicability of negligence principles in a strict liability case,<sup>22</sup> Indiana courts continued to use the language of *Campo* and *Sandefur* in strict liability cases.<sup>23</sup> Finally, the Indiana Supreme Court converted the overruled negligence language in *Campo* and the dicta that it spawned in *Sandefur*, into a defect requirement for proving a defect in strict liability in *Bemis Co. v. Rubush*.<sup>24</sup> Although *Bemis* was apparently a design defect case,<sup>25</sup> the majority of the Indiana Supreme Court believed that if the danger or defect was open and obvious, the product could not be defective.<sup>26</sup> Although the *Bemis* decision was highly criticized,<sup>27</sup> Indiana courts followed the open and obvious danger rule without modification until the recent decision of *Hoffman v. E.W. Bliss Co.*<sup>28</sup>

<sup>15</sup>See *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139, 1144-45 (5th Cir. 1978) (expert testimony as to feasible alternative designs for hanging meat trailer sufficient to allow jury conclusion that defendant's design was unreasonably dangerous); see also Phillips, *The Unreasonably Dangerous Product*, 15 TRIAL 22, 23 (1979).

<sup>16</sup>245 Ind. 213, 197 N.E.2d 519 (1964).

<sup>17</sup>*Id.* at 221-22, 197 N.E.2d at 522-23.

<sup>18</sup>301 N.Y. 468, 95 N.E.2d 802 (1950), cited in *Sandefur*, 245 Ind. at 222, 197 N.E.2d at 523.

<sup>19</sup>301 N.Y. at 472, 95 N.E.2d at 804.

<sup>20</sup>See *id.* at 471, 95 N.E.2d at 803.

<sup>21</sup>See *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

<sup>22</sup>See *supra* note 7.

<sup>23</sup>See Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 280-81 n.61 (1976) and cases cited therein.

<sup>24</sup>427 N.E.2d 1058, 1061 (Ind. 1981) (citing *Burton v. L.O. Smith Foundry Prods. Co.*, 529 F.2d 108 (7th Cir. 1976); *Posey v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964)).

<sup>25</sup>See 427 N.E.2d at 1060-61.

<sup>26</sup>*Id.* at 1061.

<sup>27</sup>See, e.g., Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

<sup>28</sup>448 N.E.2d 277 (Ind. 1983).

The Indiana Supreme Court seems to have modified the open and obvious danger rule to some degree in *Hoffman*. There, the plaintiff knew of the danger of placing his hand into the die area of a punch press and knew that a descending ram in that area could cause him harm but still recovered for his injury. However, the court stated that a finding of open and obvious danger depends upon how broadly one construes “danger.”<sup>29</sup> The *Hoffman* court said that the injury-producing mechanism of the machine—the descending ram—was an open and obvious danger; however, the plaintiff’s theory was that some unknown malfunction of the press and the defendant’s failure to warn of this unknown defect had caused his injury.<sup>30</sup> Thus, under *Hoffman*, for the open and obvious danger rule to apply, the exact alleged malfunction or defect must be the item that is “truly and entirely open and obvious.”<sup>31</sup>

2. *The Duty to Warn*.—The *Hoffman* case also helped resolve the conflict in prior decisions concerning whether a manufacturer or seller could fulfill his obligation to warn by informing an intermediate party, such as the plaintiff’s employer, of the dangers associated with the product. In *Sills v. Massey-Ferguson, Inc.*,<sup>32</sup> the court stated:

In a slightly different setting, it would appear that the warning need not necessarily be given to the person actually injured in order for the manufacturer to escape liability. It would seem that the warning may be given to a person in a position such that he may reasonably be expected to act so as to prevent the danger from manifesting itself.<sup>33</sup>

Later, in *Burton v. L.O. Smith Foundry Products, Co.*,<sup>34</sup> the Court of Appeals for the Seventh Circuit found it sufficient for the manufacturer to warn the plaintiff’s employer<sup>35</sup> and expanded the non-duty to warn:

A duty to warn exists only when those to whom the warning would go can reasonably be assumed to be ignorant of the facts which a warning would communicate. If it is unreasonable to assume that they are ignorant of those facts, there is no duty to warn. . . .

. . . .

. . . Smith’s duty was only to make known, to those Interna-

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<sup>29</sup>*Id.* at 285.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>296 F. Supp. 776 (N.D. Ind. 1969).

<sup>33</sup>*Id.* at 783 (citing *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (negligence action); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959) (negligence action)).

<sup>34</sup>529 F.2d 108 (7th Cir. 1976).

<sup>35</sup>*Id.* at 111.

tional Harvester employees to whom it had access, properties of its product that were dangerous but non-obvious.<sup>36</sup>

Thus, under *Burton*, the seller could fulfill his obligation to warn merely by warning the employer and not the employee who ultimately would use the product. The *Burton* case was soon contradicted by *Reliance Insurance Co. v. AL E. & C. Ltd.*,<sup>37</sup> where the Seventh Circuit court said:

"[T]he sole question . . . is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. *This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence.* The jury should view the relative degrees of danger associated with use of the product since a greater degree of danger requires a greater degree of protection.

. . . . .  
Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the product. *The duty to provide a non-defective product is non-delegable.*"<sup>38</sup>

The Indiana Supreme Court appeared to have decided that the *Burton* rationale should prevail when it decided *Shanks v. A.F.E. Industries, Inc.*,<sup>39</sup> and said that a duty to warn, if it existed at all, could be fulfilled by warning the employer.<sup>40</sup> However, in the *Hoffman* case, the court stated:

It is clear the manufacturer can never delegate to a second party the duty to warn of the presence of a latent defect and the potential danger in use of the product should the defect become effectively operable. Thus, whatever may be said about the delegability of Bliss' duty to warn about dangers associated with the use of the product when the product functioned properly, in the case at bar where there is evidence the danger associated with the use of the product is due to the presence of a latent structural defect in the product it cannot be said the manufacturer could delegate its warning duties to any other party.

In summary, Hoffman produced sufficient evidence for the

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<sup>36</sup>*Id.* at 111-12.

<sup>37</sup>539 F.2d 1101 (7th Cir. 1976). *Reliance* was decided about seven months after *Burton*.

<sup>38</sup>539 F.2d at 1106 (quoting *Berkebile v. Brantley Helicopter Co.*, 462 Pa. 83, 103, 337 A.2d 893, 902-03 (1975)) (emphasis supplied by *Reliance* court).

<sup>39</sup>416 N.E.2d 833 (Ind. 1981).

<sup>40</sup>*Id.* at 837 (citing *Burton v. L.O. Smith Foundry Prods. Co.*, 529 F.2d 108 (7th Cir. 1976)).

jury to have believed the press was defective in manufacture or design, and that such flaw caused an uninitiated cycle of operation to occur. The duty to warn of the fact of the defective manufacture or design was nondelegable by Bliss.<sup>41</sup>

The *Hoffman* decision calls into question the Indiana Court of Appeals decision in *Ortho Pharmaceutical Corp. v. Chapman*,<sup>42</sup> which stated that drug manufacturers need only warn physicians, not the ultimate user, of dangers associated with use of the drug.<sup>43</sup> In addition, such drug manufacturers need only warn of risks known or risks that should be known during the period when the patient is using the drug.<sup>44</sup>

Does *Hoffman's* statement that the duty to warn is owed to the ultimate user apply in drug cases? The inadequate instructions given to the plaintiff in *Hoffman* by his employer would logically relate to inadequate instructions given by a doctor to his patient. At a minimum, the drug manufacturer should be obligated to request that physicians give their patients the information contained in the package inserts or the *Physician's Desk Reference* or both.

3. *Control Over the Work Place.*—What is the essential difference between *Shanks*, which held that only the employer need be warned, and *Hoffman*, where the court held that the ultimate user must be warned? The *Hoffman* court stated that one of the key differences was that in *Shanks*, the manufacturer had no control over the work space, the hiring, instruction or placement of personnel, nor the manner of integrating the product into the employer's operation.<sup>45</sup> However, the work space rationale could not be a distinguishing factor because nothing in the *Hoffman* court's statement of facts indicates that the manufacturer-defendant had any control over the hiring, instruction, or placement of any of the personnel at the plaintiff's place of employment.<sup>46</sup> As to the integration of Bliss' punch press into the employer's operation, the majority opinion of the Indiana Supreme Court explicitly stated that the "safety package" of three different modes of operation chosen by the plaintiff's employer were purchased from a party other than the defendant and installed by the employer's personnel.<sup>47</sup> For the *Hoffman* court to distinguish *Shanks* on the grounds that the defendant had control over the plaintiff's employer's work place simply does not comport with the facts as stated in the majority opinion.

The work place rationale would permit a manufacturer to avoid liability by shifting his primary responsibility for warning of the defects in

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<sup>41</sup>448 N.E.2d at 286 (citation omitted).

<sup>42</sup>180 Ind. App. 33, 388 N.E.2d 541 (1979).

<sup>43</sup>*Id.* at 43, 388 N.E.2d at 548 (citing numerous authorities from outside Indiana).

<sup>44</sup>*Id.*, 388 N.E.2d at 548.

<sup>45</sup>448 N.E.2d at 286.

<sup>46</sup>*See id.* at 278-81, 286.

<sup>47</sup>*Id.* at 278.



his product to the employer of an injured worker. The manufacturer, as an expert in his field,<sup>48</sup> should have sufficient knowledge to provide reasonably safe products. He is either aware or should be aware (as a matter of law) of the practices and procedures in the work place.<sup>49</sup> The work place, as the environment in which the product is placed, is not a mysterious place unknown to the product manufacturer. The manufacturer is either aware, or should be aware, of the injuries that occur with certain product designs. The practices being used in the work place are, and should be, of major concern to the product manufacturer. His basic design choices and his method of protecting human beings who encounter his product are basic, nondelegable responsibilities. If a manufacturer is incapable of understanding the work place environment, including the set up, operation, and maintenance of his product, then he should not be allowed to place his product into the work place.

Any attempt to delegate to an employer the manufacturer's basic responsibility for warning or instructing on the use of certain products, or for guarding them, can be a highly dangerous practice. In many workshops, the employer is neither knowledgeable concerning the design of the products and machines used in his work place nor equipped to make them safe. The employer's staff may or may not have the expertise to equip, guard, or alter a machine manufactured by another. The intricacies of design are for an engineer, not an employer whose primary concern is profit from the production and use of the machine. If the employer has more knowledge than the manufacturer about design, safety, use, guarding, and operation of a particular product, then he should produce his own machine. To shift the obligations of safe design and instructions or warnings for the use of a product to an employer, merely because the employer has possession or ownership of the product and hires and fires the employees who work or maintain the product, is to shift responsibility from the expert to the ignorant.

4. *Component in a Multifaceted Operation.*—The *Hoffman* court also distinguished *Shanks* by characterizing the allegedly defective product in *Shanks* as "a component in a multifaceted operation."<sup>50</sup> Surely the three majority judges in *Hoffman* do not contend that the mere fact of a multifaceted operation that has a defective component can prevent liability, because it is apparent that a defective component part can be

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<sup>48</sup>See *Dias v. Daisy-Heddon*, 180 Ind. App. 657, 665, 390 N.E.2d 222, 227 (1979); cf. *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979) (drug manufacturer); see also Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 847-48 (1962).

<sup>49</sup>In *Newton v. G.F. Goodman & Son, Inc.*, 519 F. Supp. 1301 (N.D. Ind. 1981), the court stated: "A manufacturer is charged with a duty to anticipate what the environment will be like in which the product is to be used and what the foreseeable risks of such use are." *Id.* at 1306 (citing *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1979)).

<sup>50</sup>448 N.E.2d at 286.

a basis for liability.<sup>51</sup> In addition, the punch press in *Hoffman* was itself a “component in a multifaceted operation” inasmuch as the employer added to the machine a package of three modes of operation, which was produced by a manufacturer other than the defendant.<sup>52</sup>

Thus, neither the “work place” rationale nor the “component in a multifaceted operation” rationale can legitimately serve as a principled distinction between the *Shanks* and *Hoffman* cases, given the facts of each case. The only other distinction cited by the *Hoffman* court was that in *Shanks*, “there was no evidence any manufacturing or design defect was causally related to the accident.”<sup>53</sup> In *Hoffman*, however, the plaintiff did present evidence that such a defect proximately caused his injury.<sup>54</sup>

First, it should be noted that *Shanks* was a warning defect case,<sup>55</sup> so no evidence of a manufacturing or design defect was necessary in that case. Second, if the only distinction between the cases is that the product in *Hoffman* was defective while the product in *Shanks* was not, it hardly seems necessary for the court to manufacture such dubious distinctions as the “work place” or “multifaceted system” rationales to reach the different results. A cynic might predict, however, that some future plaintiff will be denied recovery on the basis of those rationales. Finally, the plaintiff in *Shanks*, like the plaintiff in *Hoffman*, could legitimately state that his injuries were “caused by mechanisms that due to a hidden defect cause it to operate or malfunction at a time when the user has every reason to expect it will not.”<sup>56</sup> Thus, the *Hoffman* case seems indistinguishable from *Shanks*.

5. *Does Hoffman Eliminate the Open and Obvious Danger Rule?*—The facts and holding in *Hoffman* indicate that a seller has a nondelegable duty to warn the ultimate user or consumer of the product, irrespective of the seller’s control or non-control over the work place.<sup>57</sup> The warning must inform the ultimate user of *any* latent defects in the product, and the duty to warn is operative even if the defendant did not know of the

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<sup>51</sup>See, e.g., *Noefes v. Robertshaw Controls Co.*, 409 F. Supp. 1376 (S.D. Ind. 1976). In *Noefes*, the plaintiff was injured when a hot water heater, equipped with a safety valve manufactured by the defendant, exploded. The defendant did not manufacture any other component of the water heater. The defendant moved to dismiss the strict liability count of the plaintiff’s complaint on the ground that the theory of strict liability does not apply to the manufacturer of a component part made or assembled by others. The district court denied the defendant’s motion, stating its belief that Indiana courts would approve of the application of the strict liability theory to manufacturers of component parts. *Id.* at 1380. See also *Lantis v. Astec Indus.*, 648 F.2d 1118, 1121 (7th Cir. 1981); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 100, at 663-64 (4th ed. 1974).

<sup>52</sup>See 448 N.E.2d at 278-79.

<sup>53</sup>*Id.* at 286.

<sup>54</sup>*Id.*

<sup>55</sup>See 416 N.E.2d at 836.

<sup>56</sup>448 N.E.2d at 285.

<sup>57</sup>See *supra* notes 41-47 and accompanying text.

specific alleged defect.<sup>58</sup> The *Hoffman* court stated that "[i]t is clear that whatever this defect or malfunction was, neither Hoffman *nor anyone else* could see it without making the kind of inspection the user of the product in a § 402A action is not expected to have made."<sup>59</sup> Neither the plaintiff's expert nor the defendant's expert found any defect that would cause a double tripping of the press,<sup>60</sup> nor did the defendant ever admit that the particular press did in fact double trip. Thus, the defendant, completely without either actual knowledge or constructive knowledge, was required by the court to provide a warning. But a warning of what? The *Hoffman* court's summary indicates that Bliss should have warned of the "double trip" defect.<sup>61</sup> But in the main body of the opinion, the court stated:

Moreover, [the defendant] Bliss can be charged with constructive knowledge of the fact that no matter who buys its press, the basics of operation are the same: the ram will descend upon triggering by the operator to smash an impression out of a piece of sheet metal. Bliss is not in a position to claim it could not be charged with awareness of a *need to warn operators of the press to keep their hands clear of the point of operation when the press cycles*.<sup>62</sup>

If the *Hoffman* court, with this statement, was requiring the defendant to warn the plaintiff not to place his hand into the point of operation, then it contradicted the open and obvious danger rule, the court having previously stated that the point of operation area of the punch press was an open and obvious danger.<sup>63</sup>

When the *Hoffman* decision is examined closely, the following essential factors spring forth:

1. The point of operation was an open and obvious danger.<sup>64</sup>
2. The plaintiff alleged that the punch press was defective because it double tripped, not because an unreasonable danger existed in the point of operation area.<sup>65</sup>
3. The defendant must warn of only those defects of which he has actual or constructive knowledge.<sup>66</sup>
4. Neither the plaintiff nor defendant had actual or constructive knowledge of the punch press' double tripping.<sup>67</sup>

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<sup>58</sup>See *supra* note 41 and accompanying text.

<sup>59</sup>448 N.E.2d at 285 (emphasis added).

<sup>60</sup>*Id.* at 280.

<sup>61</sup>See *supra* note 41 and accompanying text.

<sup>62</sup>448 N.E.2d at 286 (emphasis added).

<sup>63</sup>*Id.* at 285.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>See *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979) (duty of drug manufacturer).

<sup>67</sup>448 N.E.2d at 285.

The above factors can be applied to existing Indiana law in the following manner:

1. The defendant had no duty to warn of the double tripping because he lacked actual or constructive knowledge of said double tripping.<sup>68</sup>
2. The defendant had no duty to warn users not to place their hands into the point of operation area because it was an open and obvious danger.<sup>69</sup>
3. Because the *Hoffman* court held that the defendant had a nondelegable duty to warn of the defective manufacture or design of its product,<sup>70</sup> then the rule of law under either 1 or 2 above is incorrect or must be modified.

Thus, the *Hoffman* court must be informing the bench and bar either that the open and obvious danger rule no longer exists, or that defendants must warn of unknown and unknowable dangers.

6. *The Defense of Misuse.*—In *Greeno v. Clark Equipment Co.*,<sup>71</sup> the first Indiana case adopting section 402A,<sup>72</sup> the District Court for the Northern District of Indiana stated that the defense of misuse refutes either a defective condition or the causation element.<sup>73</sup> Later, *Cornette v. Searjeant Metal Products*<sup>74</sup> relegated misuse to a foreseeability issue but considered misuse an affirmative defense.<sup>75</sup> In *Fruehauf Trailer Division v. Thorton*,<sup>76</sup> the court examined misuse closely and stated that when the user has knowledge of the defect, misuse becomes part of assumption of the risk;<sup>77</sup> however, the failure to discover or guard against a defect is merely contributory negligence (not misuse)<sup>78</sup> and is not a defense to a strict liability action.<sup>79</sup>

Misuse is a use which is not foreseeable. This does not mean that a manufacturer may merely state that the use was not intended from his subjective viewpoint. Intended use includes all reasonably foreseeable uses,

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<sup>68</sup>See *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979).

<sup>69</sup>See *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981).

<sup>70</sup>448 N.E.2d at 286.

<sup>71</sup>237 F. Supp. 427 (N.D. Ind. 1965).

<sup>72</sup>*Id.* at 433 (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965) as the law in Indiana).

<sup>73</sup>237 F. Supp. at 429.

<sup>74</sup>147 Ind. App. 46, 258 N.E.2d 652 (1970). *Cornette* was the first case in which § 402A was expressly adopted by an Indiana state court. See *id.* at 52, 258 N.E.2d at 656.

<sup>75</sup>*Id.* at 665 (Sharp, J., concurring); see *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 688-89 (1970).

<sup>76</sup>174 Ind. App. 1, 366 N.E.2d 21 (1977).

<sup>77</sup>*Id.* at 11, 366 N.E.2d at 29.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 10-11, 366 N.E.2d at 29 (quoting *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970)).

considering the environment in which the product will be placed.<sup>80</sup> Thus, a manufacturer could not escape liability if a screwdriver were used to open paint cans by stating that the only intended use of a screwdriver is to drive screws into wood.

Foreseeable uses of a product directly affect the defendant's obligation to instruct adequately on the proper use and to warn of the dangers of a product.<sup>81</sup> Whenever a plaintiff uses a product in contravention of legally sufficient instructions and warnings, the defendant may sustain the defense that the plaintiff assumed the risk<sup>82</sup> by proving all four elements of assumed risk—knowledge, understanding, appreciation and voluntariness.<sup>83</sup> When a court states that any "foreseeable misuse" does not bar recovery, the court is using a lay definition of misuse and is merely stating that the use is foreseeable and is therefore not misuse and not a defense. Before his opinion was vacated by the Indiana Supreme Court, Judge Chipman, in *Conder v. Hull Lift Truck, Inc.*,<sup>84</sup> gave the best description of "foreseeable misuse":

Allis-Chalmers argues the term "misuse" as used in Instruction No. 10 "implies a lack of foreseeability." However, there is nothing in the wording of this instruction which directs the lay juror to consider the element of foreseeability; indeed the jury may well have applied the usual and much narrower lay definition of misuse (i.e., improper use, abuse, or abnormal use) without considering the uses of the product in the environment which should reasonably have been foreseen by the manufacturer.<sup>85</sup>

Justice Pivarnik's opinion in *Conder* framed the misuse concept as an issue of foreseeable (or unforeseeable) intervening cause.<sup>86</sup> Thus, if the conduct that allegedly constitutes misuse is foreseeable, it is not an intervening cause and cannot bar liability. However, on some occasions a product could be used in a non-foreseeable manner, yet recovery should still be allowed. For example, if the injuring defect is not associated with the misuse, it is the defect, *not* the misuse, which causes the injury. In such a situation, causation will determine liability.

The *Hoffman* court discussed the issue of misuse and concluded that: (1) Misuse is a *defense* to strict liability.<sup>87</sup> (2) The plaintiff's failure to

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<sup>80</sup>See *supra* note 49.

<sup>81</sup>See *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 119-21, 258 N.E.2d 681, 689-90 (1970).

<sup>82</sup>See *id.* at 119, 258 N.E.2d at 689.

<sup>83</sup>See *Kroger v. Haun*, 177 Ind. App. 403, 415-16, 379 N.E.2d 1004, 1012 (1978); RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

<sup>84</sup>405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982).

<sup>85</sup>405 N.E.2d at 546.

<sup>86</sup>435 N.E.2d at 15-17.

<sup>87</sup>448 N.E.2d at 283 (citing, e.g., *Latimer v. General Motors Corp.*, 535 F.2d 1020

discover or guard against a defect is contributory negligence and not misuse and is, therefore, not a defense in a strict liability action.<sup>88</sup> (3) If the plaintiff discovers the defect or uses the product in contravention of a legally sufficient warning, he is subject to the defense of incurred or assumed risk.<sup>89</sup> (4) Misuse is not a defense if the instruction or warning is inadequate.<sup>90</sup> The *Hoffman* court also held that it was the duty of the seller or manufacturer to warn the ultimate user or consumer and that such a *duty is nondelegable*.<sup>91</sup>

7. *Is Hoffman an Aberration?*—As indicated in the foregoing discussion, the *Hoffman* decision *could* greatly affect Indiana products liability law and mark the beginning of the end of the open and obvious danger rule.<sup>92</sup> However, it is possible that *Hoffman* was based upon a unique factor. At a recent Indiana conference on products liability law, it was pointed out that the plaintiff in *Hoffman* was the son of a judge on the Indiana Court of Appeals.<sup>93</sup> Hopefully, the *Hoffman* decision is not an aberration in the law based upon the plaintiff's identity. However, two recent Indiana cases demonstrate that the open and obvious danger rule is still effective in overturning jury decisions in favor of a plaintiff.<sup>94</sup>

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(7th Cir. 1976); *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 258 N.E.2d 681 (1970)).

<sup>88</sup>448 N.E.2d at 282 (quoting *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 119, 358 N.E.2d 681, 689 (1970)).

<sup>89</sup>448 N.E.2d at 283 (quoting *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970)).

<sup>90</sup>448 N.E.2d at 283. The *Hoffman* court stated:

In the case at bar the instruction [given by the trial court] states that one can be subject to the defense of misuse even where he was "inadequately instructed." . . . It defies logic to hold a user has misused a product when its danger is not open and obvious and moreover no one has warned the user of the presence of a latent danger associated with the product's use.

*Id.* The court thus held that the trial court erred in giving the instruction in question. *Id.*

<sup>91</sup>*Id.* at 286.

<sup>92</sup>See *supra* notes 63-70 and accompanying text.

<sup>93</sup>Address by Peter Obrebsky, Indiana Continuing Legal Education Forum Seminar on Products Liability Law (Oct. 7, 1983).

<sup>94</sup>See *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181 (Ind. 1983), *rev'g*, 404 N.E.2d 606 (Ind. Ct. App. 1980); *Bryant-Poff, Inc. v. Hahn*, 454 N.E.2d 1223 (Ind. Ct. App. 1982), *trans. denied*, 453 N.E.2d 1171 (Ind. 1983) (Hunter, J., dissenting to denial of transfer).

The *Hahn* decision is especially troubling. The defendant designed, manufactured, and installed two grain elevator legs at the place of business of the plaintiff's employer. The defendant also provided two electrical cut-off devices which, when engaged, prevented operation of the equipment, but the plaintiff was never instructed on the location or operation of the cut-off devices. The employer sent the eighteen-year-old plaintiff to paint one of the elevator legs on a platform ninety feet above the ground. The motor-driven chain and sprocket that powered the vertical conveyor of the elevator leg were located about four feet above the maintenance platform. As the plaintiff reached his hand between the unguarded chain and sprocket to touch up a rust spot behind the sprocket, a fellow employee activated the motor. The plaintiff's arm was caught between the chain and sprocket and was crushed,

Therefore, it appears that the uniqueness of the plaintiff's identity may have been a factor in the *Hoffman* court's apparent limitation on the open and obvious danger rule.

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eventually requiring amputation below the elbow. 454 N.E.2d at 1224.

The plaintiff sued the defendant on theories of negligence and strict liability in tort. The jury returned a verdict for the plaintiff and awarded damages in the sum of \$663,000. The court of appeals reversed, holding that the trial court erred in failing to grant the defendant's motion for judgment on the evidence. *Id.* at 1225. The court of appeals plainly based its decision on the open and obvious danger rule:

Although there was evidence from which the jury could have concluded that the unguarded chain and sprocket mechanism was unreasonably dangerous in light of industry regulations and standards at the time it was designed and manufactured, we do not read *Bemis*, *Shanks*, and [*Coffman v. Austgen's Electric, Inc.*, 437 N.E.2d 1003 (Ind. Ct. App. 1982)] to permit liability to attach when that defect should have been obvious to the party injured.

454 N.E.2d at 1225.

This statement demonstrates a confused understanding of Indiana law. As Justice Hunter pointed out in his opinion dissenting to denial of transfer, 453 N.E.2d 1171 (Ind. 1983), "[I]t is inconsistent under Indiana law to find something unreasonably dangerous but also open and obvious . . . . The [*Bemis*] majority . . . determined that if a danger is open and obvious to the person using it, the product is not unreasonably dangerous." *Id.* at 1171-72 (citing *Bemis*, 427 N.E.2d at 1061).

Justice Hunter also noted that the issue of unreasonably dangerous or open and obvious is normally to be decided by the jury. 453 N.E.2d at 1172 (citing *Bemis*, 427 N.E.2d at 1064; *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 285 (Ind. 1983)). Stating that a motion for judgment on the evidence should only be sustained when "there is no substantive evidence or reasonable inferences to be derived therefrom to support an essential element of the claim," 453 N.E.2d at 1172, Justice Hunter found that "it is obvious the evidence was sufficient to justify submitting the case to the jury." *Id.* at 1173. After reviewing the evidence presented to the jury and the law of this state that applies to those facts, Justice Hunter correctly concluded that "[b]ecause there was evidence from which the jury could have concluded that Hahn's injury was a result of a defectively designed product or that [the defendant] had failed to provide adequate warnings or instructions, the trial court was justified in submitting the case to the jury." *Id.* at 1174-75.

Another disturbing aspect of the *Hahn* case is the timing of the publication of the court of appeals decision. The date of the decision was December 22, 1982. See *Hahn*, 454 N.E.2d at 1223. The decision was originally noted in the table of "Disposition of Cases by Unpublished Memorandum Decision in the Court of Appeals of Indiana." 443 N.E.2d at 1266. There it is noted that, pursuant to IND. R. APP. P. 15(A)(3), "[u]nless specifically designated 'for publication', memorandum decisions shall not be published *nor shall they be regarded as precedent nor cited before any court* except for the purpose of establishing the defense of Res Judicata, collateral estoppel or law of the case." 443 N.E.2d at 1266 (quoting IND. R. APP. P. 15(A)(3)) (emphasis added).

Approximately five and one-half months after the *Hahn* case was decided, the Indiana Supreme Court decided *Hoffman*, on May 4, 1983. See 448 N.E.2d at 277. Thus, although the *Hahn* decision seems to be a revival of the broadest form of the open and obvious danger rule, and therefore contrary to the rationale of *Hoffman*, the defendant in *Hoffman* was precluded from citing the *Hahn* case to the court under Appellate Rule 15(A)(3). Only after *Hoffman* was decided was *Hahn* published, and only then did its confused reasoning become available as precedent to the defense attorneys of this state. This curious and unusual timing can only lend credence to the suggestion that the uniqueness of the plaintiff's identity influenced the *Hoffman* decision. See *supra* note 93 and accompanying text.

Clearly, these two recent Indiana decisions have saved the open and obvious danger rule from total elimination. The only possible reconciliation of *Hoffman* with the latest decisions is to relegate the open and obvious danger rule to the defense of contributory negligence in negligence cases, and to the defense of incurred risk in strict liability cases.

### C. *A Suggested Alternative for the Open and Obvious Danger Rule*

As has been suggested, the open and obvious danger rule does not logically negate the defect requirement of section 402A since many extremely dangerous defects are quite open and obvious.<sup>95</sup> Instead, the open and obvious danger rule focuses on the conduct of the plaintiff and not the condition of the product, and thus, could be retained as evidence of contributory negligence or assumption of risk. If the danger can be seen, then its obviousness should become a factor in determining whether the plaintiff acted reasonably with respect to the danger, i.e., whether he was contributorily negligent.<sup>96</sup> In the context of assumed risk, if the plaintiff becomes aware of the obvious danger, its obviousness should be a factor in determining whether he had an adequate understanding and appreciation of the danger and whether he was presented with viable alternatives, such that his conduct could be considered voluntary in encountering the risk. As a part of either contributory negligence or assumption of the risk, the openness or obviousness of the danger or risk should be only a factor, and not a conclusion as a matter of law, in determining whether the plaintiff's conduct should bar his recovery. If the Indiana Supreme Court were to adopt such an approach, Indiana would join other jurisdictions<sup>97</sup> in applying logic and fairness to strict liability and would return to the basic rationale for the adoption of strict liability in tort—the promotion of safety and compensation of deserving victims of defective products.<sup>98</sup>

### D. *Res Ipsa Loquitur*

Three recent cases, *SCM Corp. v. Letterer*,<sup>99</sup> *Bituminous Fire & Marine Insurance Co. v. Culligan Fyrprotexion, Inc.*,<sup>100</sup> and *Hammond v. Scot Lad Foods, Inc.*,<sup>101</sup> discussed the concept of *res ipsa loquitur* in Indiana. These concepts are discussed at length in the Torts section of

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<sup>95</sup>See *supra* text accompanying notes 5-6.

<sup>96</sup>See *supra* note 7.

<sup>97</sup>See, e.g., *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971) (applying Pennsylvania law); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Auburn Mach. Works v. Jones*, 366 So. 2d 1167 (Fla. 1979); see also Phillips, *supra* note 27.

<sup>98</sup>See *supra* note 2 and accompanying text.

<sup>99</sup>448 N.E.2d 686 (Ind. Ct. App. 1983).

<sup>100</sup>437 N.E.2d 1360 (Ind. Ct. App. 1982).

<sup>101</sup>436 N.E.2d 362 (Ind. Ct. App. 1982).



this Survey;<sup>102</sup> however, it is worth repeating that the requirement that the defendant must be in control of the injuring agency or instrumentality *at the time of the accident* (as opposed to the time of the defendant's alleged negligence) applies only to the negligence theory.<sup>103</sup> The inferences raised by the doctrine of *res ipsa loquitur* are also raised in strict liability actions, although, strictly speaking, the doctrine itself does not apply to such actions.<sup>104</sup> Thus, if the plaintiff in a products liability action desires the inferences raised by *res ipsa*, he can and should rely upon strict liability in tort and not upon *res ipsa* in negligence.

### E. Demonstrative Evidence

In *SCM Corp. v. Letterer*,<sup>105</sup> the plaintiff's expert was unable to test or examine an allegedly defective toaster which reputedly caused a fire in plaintiff's home. The expert did, however, examine and test a similar toaster manufactured by the defendants. The similar toaster had some cosmetic differences from the toaster involved in the fire, but, according to the plaintiff's expert, the similar toaster "operated the same" as the toaster which was destroyed in the fire.<sup>106</sup> The trial court allowed the plaintiff to use the similar toaster as demonstrative evidence and as a basis for the expert's opinion that the destroyed toaster was defective. The *Let-*

<sup>102</sup>See Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341, 372 (1984).

<sup>103</sup>See *SCM Corp. v. Letterer*, 448 N.E.2d 686, 689 (Ind. Ct. App. 1983).

<sup>104</sup>This was best explained in *Letterer*, where Judge Miller, writing for the Fourth District of the Indiana Court of Appeals, stated:

To conclude [that *res ipsa* applies even though the manufacturer did not have exclusive control of the injuring instrumentality at the time of the accident] would push the *res ipsa loquitur* doctrine further and further into the battlefield of strict liability. In fact, it has been argued that in products liability litigation *res ipsa* is a species of strict liability. 1 Frumer & Friedman, *Products Liability* § 12.03[8]. We are in agreement with the following language of California's Justice Traynor:

"An injured person, . . . is not ordinarily in a position to refute [proper care on the part of a manufacturer] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. *It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.*"

*Escola v. Coca-Cola Bottling Co. of Fresno*, (1944) 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (concurring opinion) (Emphasis added). Our decision, therefore, does not deny the [plaintiffs] a recovery. Instead, it channels their proof into a more compatible action, strict liability.

448 N.E.2d at 690. See also *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 64-67, 258 N.E.2d 652, 663-65 (1970) (Sharp, J., concurring).

<sup>105</sup>448 N.E.2d 686 (Ind. Ct. App. 1983).

<sup>106</sup>*Id.* at 688.

terer court approved of the use of the similar toaster as demonstrative evidence,<sup>107</sup> and of its use as a basis for the expert's opinion, from which the jury could find circumstantial evidence of the defectiveness of the original toaster.<sup>108</sup> In addition, the court noted that substantially similar products are admissible as demonstrative evidence when the original has become lost or unavailable.<sup>109</sup>

#### *F. Constitutionality of Indiana's Products Liability Statute of Limitations*

In *Scalf v. Berkel, Inc.*,<sup>110</sup> the plaintiff was injured by a product which was delivered over ten years prior to the plaintiff's injury. The plaintiff asserted federal due process and equal protection attacks on the ten-year limitation period in the Products Liability Statute.<sup>111</sup> The *Scalf* court, referring to *Dague v. Piper Aircraft Corp.*,<sup>112</sup> found compliance with the due process<sup>113</sup> and equal protection<sup>114</sup> mandates of the fourteenth amendment. During the *Scalf* court's discussion of the legislature's goals in enacting the statute, the court stated:

The General Assembly was confronted by evidence of skyrocketing product liability insurance costs fueled by huge increases in the number of product liability claims, large increases in the amounts of settlements and awards, and indications that the victim of an allegedly defective product was favored over the maker of that product in the tort process.<sup>115</sup>

The vast majority of the above information, a great deal of which has since proven false,<sup>116</sup> was presented to the General Assembly by or on behalf of manufacturers and their insurance carriers. Thus, the Products Liability Statute and the evidence presented to the legislature to support it are, at least in part, without foundation. Nevertheless, as the *Scalf* court indicated in a footnote to its opinion, the courts will not second guess the wisdom of the legislative actions.<sup>117</sup>

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<sup>107</sup>*Id.* at 692.

<sup>108</sup>*Id.* at 691 (citing *Senco Prods., Inc. v. Riley*, 434 N.E.2d 561, 568 n.11 (Ind. Ct. App. 1982); *Remington Arms Co. v. Wilkins*, 387 F.2d 48 (5th Cir. 1967); *Trowbridge v. Abrasive Co.*, 190 F.2d 825 (3d Cir. 1951); *Norton Co. v. Harrelson*, 278 Ala. 85, 176 So. 2d 18 (1965)).

<sup>109</sup>448 N.E.2d at 692 (citing *McCORMICK*, EVIDENCE § 213, at 529 (2d ed. 1972)).

<sup>110</sup>448 N.E.2d 1201 (Ind. Ct. App. 1983).

<sup>111</sup>See IND. CODE § 33-1-1.5-5 (1982).

<sup>112</sup>418 N.E.2d 207 (Ind. 1981), cited in *Scalf*, 448 N.E.2d at 1202-03.

<sup>113</sup>448 N.E.2d at 1202.

<sup>114</sup>*Id.* at 1205.

<sup>115</sup>*Id.* at 1204.

<sup>116</sup>See Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 289-90 n.2 (1982).

<sup>117</sup>448 N.E.2d at 1204 n.4.

*G. The 1983 Amendments to the Products Liability Statute*

On April 21, 1983, the Indiana General Assembly amended the 1978 Indiana Products Liability Statute.<sup>118</sup> Undoubtedly, many sections of the 1983 amendments will be litigated and the issue of legislative intent will become primary in any interpretation of the amendments. Unfortunately, no legislative notes, committee comments, or histories exist. The amendments were proposed and primarily written by Senator William Vobach, who requested assistance from Pete Obremskey, John Townsend, Jr., and David Campbell, attorneys representing both plaintiffs' (Obremskey and Townsend) and defendants' (Vobach and Campbell) views. Personal interviews were conducted with these individuals<sup>119</sup> to obtain their comments upon the meaning and intent of the language that they used in the amendments.

The following is an examination of the 1983 amendments with the statute as amended,<sup>120</sup> the comments of this author, and the drafters' legislative intent clearly segregated.

SECTION 1. IC 33-1-1.5-1, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 1. **Except as provided in section 5 of this chapter**, this chapter ~~shall govern~~ **governs** all ~~products liability~~ actions ~~including those in which the theory of liability is negligence, or strict liability in tort. provided~~ **However, that this chapter does not apply to actions arising from or based upon any alleged breach of warranty.**<sup>121</sup>

*Comments.*—The 1978 Products Liability Act stated that it applied to both negligence and strict liability;<sup>122</sup> however, the Act itself used the

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<sup>118</sup>See Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE §§ 33-1-1.5-1 to -5 (Supp. 1983) (effective Sept. 1, 1983)).

<sup>119</sup>Interview with William Vobach, Indiana State Senator, at the law offices of Locke, Reynolds, Boyd & Weisell, Indianapolis, Indiana (Oct. 21, 1983) (hereinafter cited as Vobach Interview); Interview with John Townsend, Jr., President of Indiana Trial Lawyers Association, at the law offices of Townsend, Hovde, Townsend & Montross, Indianapolis, Indiana (Oct. 18, 1983) (hereinafter cited as Townsend Interview); Interview with David Campbell, at the law offices of Bingham, Summers, Welsh & Spilman, Indianapolis, Indiana (Oct. 24, 1983) (hereinafter cited as Campbell Interview); Telephone interview with Peter Obremskey, Member of Board of Directors of Indiana Trial Lawyers Association (Oct. 21, 1983) (hereinafter cited as Obremskey Interview). The interviews were conducted by an articles editor of the Indiana Law Review. Manuscript notes from the interviews are on file at the office of the Indiana Law Review.

<sup>120</sup>Additions to the text of IND. CODE §§ 33-1-1.5-1 to -5 (1982) are indicated by bold type; deletions are indicated by strikeouts.

<sup>121</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1814, 1814 (codified at IND. CODE § 33-1-1.5-1 (Supp. 1983)).

<sup>122</sup>See IND. CODE § 33-1-1.5-1 (1982).

language of strict liability from section 402A.<sup>123</sup> In addition, some question existed as to whether the Act encompassed all possible products liability actions and theories.

The 1983 amendment makes specific reference to strict liability in tort and no other theory (except in section 6, where negligence is included in the ten-year limitation period).<sup>124</sup> The 1983 amendment applies only to strict liability and relegates all other theories to Indiana common law.

*Legislative Intent.*—John Townsend, Jr., stated that all four participants agreed that the intent of section 1 was to limit the statute to actions brought under the theory of strict liability in tort, except for the statute of limitations section, which also covers negligence actions.<sup>125</sup>

SECTION 2. IC 33-1-1.5-2, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 2. As used in this chapter:

“User or consumer” ~~shall include:~~ **means** a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, **or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.**

“Product liability action” ~~shall include all actions brought for or on account of personal injury, disability, disease, death, or property damage caused by, or resulting from, the manufacture, construction, or design of any product.~~

“Physical harm” ~~includes~~ **means** bodily injury, death, loss of services, and rights arising ~~therefrom,~~ **from any such injuries,** as well as **sudden, major** damage to property. **The term does not include gradually evolving damage to property or economic losses from such damage.**

“Seller” ~~includes~~ **means** a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor.

“Product” **means** any item or good that is personalty at the time it is conveyed by the seller to another party. **It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.**

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<sup>123</sup>Compare RESTATEMENT (SECOND) OF TORTS § 402A (1965) with IND. CODE §§ 33-1-1.5-1 to -4 (1982).

<sup>124</sup>See Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 6, 1983 Ind. Acts 1814, 1817 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1983)).

<sup>125</sup>Townsend Interview, *supra* note 119.

**“Unreasonably dangerous” refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product’s characteristics common to the community of consumers.**<sup>126</sup>

*Comments—“Means.”*—The 1983 amendments changed several definition sections by replacing the words “shall include” or “include” with the word “means.” This change could indicate that the definition is restricted to its exact words, a considerable change from the 1978 Act. For instance, the term “user or consumer” would be restricted to persons who actually use or consume the product or to persons in actual possession of the product acting on behalf of the user. Such a restrictive meaning would be in direct conflict with Indiana case law.

*Legislative Intent—“Means.”*—All four authors agreed that the change from “shall include” or “include” to “means” was *not* intended to restrict any of the definitions to the exact words that appear in the statute.<sup>127</sup> In fact, Senator Vobach stated that the words “shall include” and “means” should be considered synonymous.<sup>128</sup> The definitions of “user” and “consumer” should remain consistent with present Indiana case law on section 402A, and the drafters intended absolutely no change from the common law.<sup>129</sup>

*Comments—“Bystander.”*—The 1983 language requiring the injured bystander to be in the vicinity of the product during its expected use could be construed to be more restrictive than the Indiana common law interpretation, which allows any reasonably foreseeable bystander to recover.<sup>130</sup> If “vicinity” and “expected use” are interpreted as concepts of reasonable foreseeability, then they cause no change in Indiana law; however, if those terms are interpreted as more restrictive than reasonable foreseeability, serious problems may arise. Why should the most innocent party imaginable be penalized? A bystander is a favorite of the law since he does nothing to affect the product. This amendment could unjustly deprive a person of recovery when he is walking on the sidewalk and is injured by an object thrown from a defective lawnmower merely because he may not meet the vicinity requirement of section 2. What if that same bystander meets the vicinity requirement, but the user was operating the mower in an unexpected manner? If the mower is defective and the defect causes

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<sup>126</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 2, 1983 Ind. Acts 1814, 1814-15 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1983)).

<sup>127</sup>Vobach Interview, *supra* note 119; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119.

<sup>128</sup>Vobach Interview, *supra* note 119.

<sup>129</sup>*Id.*

<sup>130</sup>*See* Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 342 N.E.2d 908 (1976).

the bystander's injury, it should make no difference that the mower is being used in an unexpected manner. Misuse may be an issue between the actual operator and the seller, but it should not be an issue between the bystander and seller. Of course, if the misuse is the sole cause of either the defect in the mower or the bystander's injury, the seller may not be liable.

*Legislative Intent—"Bystander."*—Senator Vobach stated that the amendment was intended to *broaden* the coverage of bystanders, consistent with section 402A.<sup>131</sup> John Townsend, Jr., agreed that the general intent of section 2 was to put section 402A and existing case law into the Act.<sup>132</sup> Senator Vobach also stated that no specific intent existed regarding the term "vicinity."<sup>133</sup>

*Comments—"Physical Harm."*—The new definition's requirement that property damage be sudden and major and that no economic loss may be recovered from gradually evolving damage could cause some unexpected problems if taken literally. What may be "sudden" and "major" to one person may not be to another. For example, "major" damage may mean a \$50 bent fender to a poor man but not to a rich man. This section may be directed to specific cases such as the "spalling brick" cases.<sup>134</sup> If so, it would be specific legislation to limit the liability of specific parties in specific cases. As such, the courts should closely scrutinize this section.

*Legislative Intent—"Physical Harm."*—Senator Vobach stated that the "sudden, major damage" language in the definition of "physical harm" was intended to exclude liability for "quasi wear and tear" and non-catastrophic loss.<sup>135</sup>

*Comments—"Seller."*—The change from "includes" to "means" could restrict the definition of "seller." Under Indiana common law, the term "seller" has an extremely broad definition that includes parties who encounter the product in the "stream of commerce."<sup>136</sup> For example, the 1983 amendment does not include a bailor in its definition of "seller," even though bailors have heretofore been included as sellers in Indiana law.<sup>137</sup>

*Legislative Intent—"Seller."*—John Townsend, Jr., stated that the drafters had no intent to change the Indiana case law definition of

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<sup>131</sup>Vobach Interview, *supra* note 119.

<sup>132</sup>Townsend Interview, *supra* note 119.

<sup>133</sup>Vobach Interview, *supra* note 119.

<sup>134</sup>*See United States Fidelity & Guar. Co. v. American Ins. Co.*, 169 Ind. App. 1, 345 N.E.2d 267 (1976).

<sup>135</sup>Vobach Interview, *supra* note 119.

<sup>136</sup>*See Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 422, 357 N.E.2d 738, 742 (1976)("[L]iability under §402A will attach to one who places such a product in the stream of commerce by sale, lease, bailment or other means.").

<sup>137</sup>*See id.* at 422, 357 N.E.2d at 742.

"seller,"<sup>138</sup> In addition, he stated that there was no intent to preclude the creation of new categories of defendants as sellers in the future.<sup>139</sup> Senator Vobach noted that the amendment broadened the Act to include lessors and stated that no intent existed with regard to types of sellers, such as bailors, not mentioned in the definition.<sup>140</sup>

*Comments—"Product."*—The new amendment restricts products to personalty and excludes any extension to realty, which does not appear to change Indiana common law. However, the Act does provide a clue to the unanswered sales-service dichotomy.

*Legislative Intent—"Product."*—The drafters intended to *exclude* realty as a product within the meaning of the Act.<sup>141</sup> In addition, whenever the service aspect of the introduction of a product into the stream of commerce is predominant, then strict liability theory does *not* apply.<sup>142</sup> The amendment was not intended to answer the question of whether a specific transaction was one of service or one of sale. For example, whether a doctor's injection of a defective drug into a patient is predominantly a sale or a service remains unanswered by the amendment.<sup>143</sup> Mr. Townsend indicated, however, that no change in Indiana law distinguishing a product from a service was intended by the amendment.<sup>144</sup>

*Comments—"Unreasonably Dangerous."*—The 1983 amendment seems to adopt the language of comment i of section 402A<sup>145</sup> and, as such, is open to interpretation.

*Legislative Intent—"Unreasonably Dangerous."*—Senator Vobach stated that the definition of "unreasonably dangerous" came from section 402A and specifically noted that it is keyed to the ordinary consumer having ordinary knowledge.<sup>146</sup>

SECTION 3. IC 33-1-1.5-2.5 is added to the Indiana Code as a NEW section to read as follows: Sec. 2.5. (a) A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

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<sup>138</sup>Townsend Interview, *supra* note 119.

<sup>139</sup>*Id.*

<sup>140</sup>Vobach Interview, *supra* note 119.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>Townsend Interview, *supra* note 119.

<sup>145</sup>See RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

<sup>146</sup>Vobach Interview, *supra* note 119.

(b) A product is defective under this chapter if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product;

when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.

(c) A product is not defective under this chapter if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter.

(d) A product is not defective under this chapter if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.<sup>147</sup>

*Comments.*—This new section contains extremely subtle language that appears at each step to limit the liability of the seller. The language in subsection (a)(1) requires “reasonable persons” and “expected users.” Does this language revive the old *Palsgraf*<sup>148</sup> reasoning that restricts the class of plaintiffs? If so, section 402A has regressed not only to negligence principles, but to fifty-year-old negligence principles. The same restrictions appear in subsection (a)(2).

In subsections (b) and (c), the “strict” has been taken out of strict liability and has been replaced by nothing more than negligence (reasonableness under like or similar circumstances).

Subsection (d) appears to adopt comment k to section 402A<sup>149</sup> without the risk-utility language of that comment. Comment k excepts unavoidably unsafe products to allow manufacturers to market the few products that have high social value but are incapable of being made safe. Thus, comment k requires a serious risk-utility examination before non-liability attaches to the product.

As between the manufacturer of a product that has such a high social value and a completely innocent plaintiff, the product manufacturer should pay for all injuries caused by the product. Even assuming that a product incapable of being made safe is socially desirable under a risk-utility analysis, warnings and instructions *must* accompany the product before it is non-defective. The language of subsection (d), if literally interpreted

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<sup>147</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 3, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5 (Supp. 1983)).

<sup>148</sup>See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>149</sup>See RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).



to be without a risk-utility analysis and a requirement of instructions and warnings, could expose the public of Indiana to some of the most dangerous products imaginable.

*Legislative Intent.*—The drafters intended to add new language requiring warnings and instructions. Although they made no mention of manufacturing and design defects, the drafters did not intentionally eliminate such defects from the Act.<sup>150</sup> The drafters *did* intend for manufacturing and design defects to be included in the Act. Senator Vobach said that a cause of action based upon design and manufacturing defects was implicit in the language in other portions of the Act. As an example, Senator Vobach noted that the state of the art defense would not be necessary unless an action could be based upon defective manufacture or design.<sup>151</sup>

Subsection (d) was apparently intended to adopt something like comment k of section 402A,<sup>152</sup> although John Townsend, Jr., stated that this subsection was not discussed in terms of comment k.<sup>153</sup> Mr. Townsend and Dave Campbell said that the drafters did not intend the subsection to relieve a manufacturer of liability if safer alternatives were available or if the product could be made safer.<sup>154</sup> None of the drafters discussed the balancing test of comment k, indicating no legislative intent either way in that regard.

SECTION 4. IC 33-1-1.5-3, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 3. ~~Codification and Restatement of Strict Liability in Tort. The common law of this state with respect to strict liability in tort is codified and restated as follows:~~ (a) One who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm ~~thereby~~ caused by that product to the user or consumer or to his property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:

(1) the seller is engaged in the business of selling such a product; and

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<sup>150</sup>Obremskey Interview, *supra* note 119.

<sup>151</sup>Vobach Interview, *supra* note 119.

<sup>152</sup>Senator Vobach said that subsection (d) was comment k "with a change." Vobach Interview, *supra* note 119. David Campbell said this subsection is much like comment k. Campbell Interview, *supra* note 119.

<sup>153</sup>Townsend Interview, *supra* note 119. Mr. Townsend stated that the drafters discussed subsection (d) in terms of inherently dangerous products such as dynamite and intended to bring the Act into conformity with existing case law. *Id.*

<sup>154</sup>*Id.*; Campbell Interview, *supra* note 119.

(2) the product is expected to and does reach the user or consumer without substantial ~~change~~ **alteration** in the condition in which it is sold **by the person sought to be held liable under this chapter.**

(b) The rule stated in subsection (a) applies although:

(1) the seller has exercised all ~~possible~~ **reasonable** care in the preparation, **packaging, labeling, instructing for use,** and sale of his product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>155</sup>

*Comments.*—Section 4 of the 1983 amendments contains several differences from the language of section 402A which seem to inject the negligence concepts of reasonableness and foreseeability into strict liability. For example, the term “reasonable” has replaced the word “possible” in subsection (b)(1). Nevertheless, a seller is not likely to avoid liability by asserting that he exercised more than all reasonable care. Thus, the language changes in section 4 may not have any substantial effect on the court’s interpretation of the Act.

*Legislative Intent.*—Pete Obremskey indicated that the drafters did not intend “all reasonable care” to change the standard as it existed under the former “all possible care” language.<sup>156</sup>

SECTION 5. IC 33-1-1.5-4, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 4. ~~Defenses to Strict Liability in Tort.~~ (a) The defenses in this ~~chapter~~ **section** are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense.

(b) With respect to any product liability action based on strict liability in tort:

(1) It is a defense that the user or consumer ~~discovered~~ **bringing the action knew of** the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.

(2) It is a defense that a cause of the physical harm is a ~~nonforeseeable~~ misuse of the product by the claimant or any other person **not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.** Where the physical harm to the claimant is caused jointly by a defect in the product which

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<sup>155</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 4, 1983 Ind. Acts 1814, 1816 (codified at IND. CODE § 33-1-1.5-3 (Supp. 1983)).

<sup>156</sup>Obremskey Interview, *supra* note 119.

made it unreasonably dangerous when it left the seller's hands and by the misuse of the product by ~~one a person~~ other than the claimant, then the ~~concurrent acts~~ **conduct of that other person does** ~~of the third party do~~ not bar recovery by the claimant for the physical harm, but shall bar any ~~rights~~ **right of the third party, that other person,** either as a claimant or as a ~~subrogee~~ **lienholder, to recover from the seller on a theory of strict liability.**

(3) It is a defense that a cause of the physical harm is a ~~nonforeseeable~~ modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm **where such modification or alteration is not reasonably expectable to the seller.**

~~(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.~~

**(4) When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled.**<sup>157</sup>

*Comments.*—The defenses to strict liability seem to remain the same as before the amendments, the only changes simply clarifying the 1978 Act's meanings. Accordingly, the word "subrogee" in subsection (b)(2) has been changed to "lienholder," which makes it clear that workers' compensation liens are barred if the employer misuses the product.

Subsection (b)(4) is a vast improvement over the 1978 Act in the "state of the art" defense. The 1978 Act seemed to allow a complete defense for compliance with custom or usage. The amendment makes it clear that state of the art has no such meaning. State of the art should mean compliance with what is economically and technologically feasible.

*Legislative Intent.*—The drafters agree that they did not intend in subsection (b)(2)—the misuse defense—to change the reasonable foreseeability test as used at common law. The change in language from "reasonably foreseeable" to "reasonably expected" was not intended to

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<sup>157</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 5, 1983 Ind. Acts 1814, 1816-17 (codified at IND. CODE § 33-1-1.5-4 (Supp. 1983)).

institute a subjective test based on the manufacturer's intent.<sup>158</sup> The objective reasonable foreseeability test is interchangeable with the new language of "reasonably expected."<sup>159</sup>

The drafters intended the change of language from "subrogee" to "lienholder" to bring the Products Liability Act into conformity with language in the Workmen's Compensation Act.<sup>160</sup>

The drafters intended the change in language in the state of the art defense to require the manufacturer to conform to the state of the art *at the time* he releases his product into the stream of commerce.<sup>161</sup> Senator Vobach also stated that subsection (b)(4) was intended to make comment j of section 402A part of the law in Indiana.<sup>162</sup>

SECTION 6. IC 33-1-1.5-5, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 5. ~~Statute of Limitations.~~ This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action **in which the theory of liability is negligence or strict liability in tort** must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.<sup>163</sup>

*Comments.*—Both negligence and strict liability are clearly within the ten-year statute of limitations under the 1983 amendment. When rewriting the Act, the framers did *not* change the word "or" to "and" between the two-year and ten-year limitation periods, a curious omission since the Indiana Supreme Court interpreted the "or" to be an "and" in *Dague v. Piper Aircraft Corp.*<sup>164</sup>

*Legislative Intent.*—Mr. Townsend stated that the drafters intended the ten-year limitation to apply to both negligence and strict liability cases.<sup>165</sup> The absence of a change in the language of "or" to "and" was

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<sup>158</sup>Vobach Interview, *supra* note 119; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119.

<sup>159</sup>Vobach Interview, *supra* note 119.

<sup>160</sup>*Id.*; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119; *see* IND. CODE § 22-3-2-13 (1982).

<sup>161</sup>Vobach Interview, *supra* note 119; Obremskey Interview, *supra* note 119.

<sup>162</sup>Vobach Interview, *supra* note 119; *see* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

<sup>163</sup>Act of Apr. 21, 1983, Pub. L. No. 297-1983 § 6, 1983 Ind. Acts 1814, 1817-18 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1983)).

<sup>164</sup>418 N.E.2d 207 (Ind. 1981).

<sup>165</sup>Townsend Interview, *supra* note 119.

merely a recognition of the *Dague* case with no intent to overrule that case.<sup>166</sup>

*General Intent Expressed by the Drafters.*—The replacement of foreseeability language with “reasonable expectability” throughout the amendment was *not* intended to change the standard of reasonable foreseeability, but was merely a common sense change to promote better understanding by juries.<sup>167</sup> In other words, the drafters intended to retain reasonable foreseeability standards in the words “reasonably expectable.”<sup>168</sup>

The drafters’ general intent was to revise the statute to conform to the general concepts of section 402A, as it has been interpreted by Indiana case law.<sup>169</sup> The drafters did not intend or contemplate any major change from Indiana case law.

#### H. Conclusion

Indiana products liability law is still in its formative stages. The Indiana Supreme Court is now at a turning point with its recent decision in *Hoffman*. Indiana could relegate its open and obvious danger rule to one of the factors of contributory negligence or assumption of risk with very little change in its case law. Such a change would bring Indiana law into line with other jurisdictions and would promote safety for Indiana citizens.

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<sup>166</sup>Vobach Interview, *supra* note 119; Campbell Interview, *supra* note 119.

<sup>167</sup>Vobach Interview, *supra* note 119.

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obrem-skey Interview, *supra* note 119.

## XI. Professional Responsibility

DONNA HILTON FISHER\*  
MARY HAMILTON WATTS\*\*

### A. Disciplinary Actions

1. *Nature of Disciplinary Proceedings.*—Pursuant to the Indiana Constitution, the Indiana Supreme Court has exclusive jurisdiction to discipline attorneys.<sup>1</sup> The court has broad discretion in conducting disciplinary hearings and in imposing sanctions for misconduct. During the survey period the supreme court discussed the nature and constitutional requirements of such proceedings.

In *In re Lewis*,<sup>2</sup> the court reiterated that the standard for judging an attorney's conduct in a disciplinary proceeding is the *Code of Professional Responsibility for Attorneys at Law* and "that such standard exists independently of issues in civil or criminal litigation out of which an allegation of impropriety may develop."<sup>3</sup> Thus, although the trial court had found that Lewis did not render effective assistance of counsel, that determination was not controlling against Lewis in the disciplinary action. Rather, in order for the supreme court to impose sanctions for such misconduct, the Disciplinary Commission must introduce sufficient independent evidence from which the court can conclude that the attorney violated the *Code*.<sup>4</sup> In *Lewis*, no such evidence was presented on the charge of ineffective assistance.<sup>5</sup>

The supreme court analyzed the constitutional requirement of procedural due process within the unique framework of a disciplinary proceeding in *In re Roberts*.<sup>6</sup> In that case, the hearing officer<sup>7</sup> found that

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<sup>1</sup>IND. CONST. art. VII, § 4, provides in part:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

<sup>2</sup>445 N.E.2d 987 (Ind. 1983).

<sup>3</sup>*Id.* at 989.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* Lewis was, however, disbarred on the basis of other counts. *Id.* at 990.

<sup>6</sup>442 N.E.2d 986 (Ind. 1983).

<sup>7</sup>A hearing officer is appointed, pursuant to Indiana Admission and Discipline Rule 23, to hear disciplinary matters and submit findings of fact and recommendations to the supreme court. IND. R. ADMISS. & DISCP. 23, § 13. Admission and Discipline rules are reproduced in the INDIANA RULES OF COURT (1983). The hearing officer's findings are not controlling upon the supreme court. *In re Crumpacker*, 269 Ind. 630, 383 N.E.2d 36 (1978), cert. denied, 444 U.S. 979 (1979).

Roberts had filed a frivolous grievance against a trial judge in violation of Disciplinary Rule 8-102(B),<sup>8</sup> even though the Disciplinary Commission did not specifically or generally allege such misconduct in the complaint.<sup>9</sup> Roberts asserted that this finding violated his right of due process. The Disciplinary Commission countered "that this issue was tried by the express or implied consent of the parties and that under Trial Rule 15(B) the complaint should be so amended."<sup>10</sup>

The supreme court determined that the constitutional issue of due process must be resolved with recognition of the unique character of disciplinary proceedings.<sup>11</sup> The court stated that neither the rules appropriate in civil cases<sup>12</sup> nor the constitutional standards necessary in criminal cases apply to disciplinary proceedings.<sup>13</sup> However, the court found that procedural due process does require that an attorney be notified of the charges and be given an opportunity to be heard in a disciplinary proceeding.<sup>14</sup> Furthermore, the court cited a United States Supreme Court decision holding that charges against an attorney cannot be amended after the attorney has testified.<sup>15</sup> Therefore, the court held that the complaint could not be impliedly amended under Trial Rule 15(B) and that procedural due process would not allow a finding of misconduct because Roberts was not aware that he was confronting a possible violation of Disciplinary Rule 8-102(B) until after he testified.<sup>16</sup>

2. *Sanctions Imposed for Misconduct.*—During the survey period, six attorneys resigned from the Bar of the State of Indiana.<sup>17</sup> Disciplinary

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<sup>8</sup>MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (1971) provides that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." The Code is reproduced in the INDIANA RULES OF COURT (1983).

<sup>9</sup>442 N.E.2d at 987.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 988.

<sup>12</sup>Admission and Discipline Rule 23, § 14(a) specifically provides that "[t]he rules of pleading and practice in civil cases shall not apply."

<sup>13</sup>442 N.E.2d at 988 (citing *In re Kesler*, 272 Ind. 161, 397 N.E.2d 574 (1979)).

<sup>14</sup>442 N.E.2d at 988 (citing *In re Wireman*, 270 Ind. 344, 367 N.E.2d 1368 (1977), *cert. denied*, 436 U.S. 904 (1977); *In re Murray*, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978)).

<sup>15</sup>442 N.E.2d at 988 (citing *In re Ruffalo*, 390 U.S. 544 (1968)).

<sup>16</sup>442 N.E.2d at 988. Roberts was suspended for six months for other misconduct. In determining the appropriate sanction, the court considered the entire course of Robert's conduct, "including any uncharged misconduct which is supported by the evidence in the record and relates to the finding of misconduct." *Id.* (emphasis added).

<sup>17</sup>*In re Randall*, 446 N.E.2d 1305 (Ind. 1983); *In re Tyler*, 445 N.E.2d 91 (Ind. 1983); *In re Edwards*, 435 N.E.2d 995 (Ind. 1982); *In re Boyle*, 435 N.E.2d 21 (Ind. 1982); *In re Zenos*, 433 N.E.2d 763 (Ind. 1982); *In re Virgil*, 432 N.E.2d 403 (Ind. 1982). Under Admission and Discipline Rule 23, § 17, an attorney confronted with allegations of misconduct may resign by delivering the required affidavit to the supreme court.

proceedings resulted in four disbarments,<sup>18</sup> seven suspensions,<sup>19</sup> and nine public reprimands.<sup>20</sup>

a. *Conduct warranting disbarment.*—In the only proceeding involving an attorney who commingled funds, the supreme court, consistent with its customary sanction for such misconduct, ordered disbarment.<sup>21</sup>

In *In re Schaumann*,<sup>22</sup> an attorney was disbarred primarily for his actions subsequent to writing a bad check. Respondent wrote a check for five thousand dollars as partial payment for equipment he had ordered. The bank returned the check due to insufficient funds. Then, respondent told the company that the failure to clear was due to bank error; however, the redeposited check again failed to clear. Moreover, when the company tried to repossess the equipment, respondent had already disposed of it. Thereafter, respondent failed to appear in court, causing the court to issue a bench warrant.

In disbaring Schaumann, the court emphasized that this was not simply a case of an attorney writing a bad check.<sup>23</sup> The court stated that, by knowingly misrepresenting that sufficient funds existed in his account, disposing of the equipment, and failing to appear in court, “[t]he Respondent has acted in blatant disregard of his ethical obligations and the laws which he has sworn to uphold. . . . His actions appear to be those of a common fugitive from the law.”<sup>24</sup>

Disbarment was also ordered in two proceedings where the findings established repeated misconduct. In *In re Lewis*,<sup>25</sup> the attorney faced a complaint containing several counts. One count involved a case from which

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<sup>18</sup>*In re Schaumann*, 446 N.E.2d 1304 (Ind. 1983); *In re Lewis*, 445 N.E.2d 987 (Ind. 1983); *In re Levinson*, 444 N.E.2d 1175 (Ind. 1983); *In re Lytal*, 444 N.E.2d 853 (Ind. 1983).

<sup>19</sup>*In re Roberts*, 442 N.E.2d 986 (Ind. 1983) (six months); *In re Callahan*, 442 N.E.2d 1092 (Ind. 1982) (two years); *In re Hirschauer*, 441 N.E.2d 480 (Ind. 1982) (thirty days); *In re Morris*, 440 N.E.2d 675 (Ind. 1982) (ninety days); *In re Leibowitz*, 437 N.E.2d 973 (Ind. 1982) (two years); *In re Brooks*, 437 N.E.2d 47 (Ind. 1982) (ninety days); *In re LeMaster*, 433 N.E.2d 787 (Ind. 1982) (two years).

<sup>20</sup>*In re Roache*, 446 N.E.2d 1302 (Ind. 1983); *In re Keithley*, 445 N.E.2d 997 (Ind. 1983); *In re Gibson*, 444 N.E.2d 852 (Ind. 1983); *In re Cissna*, 444 N.E.2d 851 (Ind. 1983); *In re Fasig*, 444 N.E.2d 849 (Ind. 1983); *In re Lantz*, 442 N.E.2d 989 (Ind. 1982); *In re Frank*, 440 N.E.2d 676 (Ind. 1982); *In re O'Brien*, 437 N.E.2d 972 (Ind. 1982); *In re Mahoney*, 437 N.E.2d 49 (Ind. 1982).

<sup>21</sup>*In re Lytal*, 444 N.E.2d 853 (Ind. 1983). In one case, the respondent had refused to distribute settlement funds; and in another, the respondent had kept a retainer fee while failing even to file suit for his client. Respondent also had urged his client not to accept an offered settlement, claiming that he could obtain a larger amount. Thereafter, he failed to appear at a scheduled pre-trial conference and at hearing on the defendant's motion to dismiss which was then granted.

<sup>22</sup>446 N.E.2d 1304 (Ind. 1983).

<sup>23</sup>*Id.* at 1305.

<sup>24</sup>*Id.* Respondent also was not an Indiana Bar Association member in good standing for failure to pay his annual registration fees since 1976. *Id.* at 1304.

<sup>25</sup>445 N.E.2d 987 (Ind. 1983).



Lewis had requested leave to withdraw. Although he told the court that he had been paid less than one hundred dollars, the Disciplinary Committee showed that he was paid more. Another count involved his campaign for Jackson County Prosecutor, during which he suggested special consideration for his friends if elected. A third count concerned an occasion on which Lewis threatened a witness with litigation unless he retracted his affidavit. On another occasion, Lewis failed to advise a client who was filing bankruptcy against transferring title to mortgaged property. Afterward, the client was charged with a criminal offense involving fraud upon creditors, and Lewis demanded additional attorney fees for this representation. The supreme court found that these actions constituted a "pattern of repeated misconduct"<sup>26</sup> which required the strongest sanction available. The court also noted its duty to protect the public from future acts by the respondent.

*In re Levinson*<sup>27</sup> also addressed a multiple count complaint. The court found that Levinson had engaged in illegal conduct involving moral turpitude by committing acts of public indecency.<sup>28</sup> In his professional relationships, Levinson was found to have neglected legal matters entrusted to him, damaged the interests of his clients, engaged in misrepresentation, and prejudiced the administration of justice.<sup>29</sup>

In deciding the appropriate sanction, the court properly looked at the gravity of the respondent's misconduct and the harm caused to his clients. Therefore, noting that Levinson's conduct was not that of a rational, educated person, the court found that its duty was to protect the public from the effect of his problem rather than to look for its root.<sup>30</sup>

*b. Conduct warranting suspension.*—Two proceedings involving attorney neglect of legal matters resulted in ninety-day suspensions for the attorney. In *In re Morris*,<sup>31</sup> the court emphasized that, although the neglect complained of was probably minimal, it occurred immediately after the attorney had been privately reprimanded for similar neglect.<sup>32</sup> The court

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<sup>26</sup>*Id.* at 990. Lewis was also charged with ineffective assistance of counsel. See *supra* text accompanying notes 2-5.

<sup>27</sup>444 N.E.2d 1175 (Ind. 1983).

<sup>28</sup>*Id.* at 1176. Police observed Levinson standing at a window of his residence, nude, masturbating, and waving to attract attention. The court found that this conduct "is of such nature as to establish the requisite baseness or depravity of social duty to constitute an act of moral turpitude." *Id.*

<sup>29</sup>*Id.* at 1176-77. For example, Levinson failed to enter an appearance and file a counterclaim resulting in a default judgment which he was unable to have set aside. He also failed to file for increased child support, yet kept the retainer, and he failed to appear and instructed his client not to appear at a final dissolution hearing even though his motion for continuance was denied.

<sup>30</sup>*Id.* at 1177.

<sup>31</sup>440 N.E.2d 675 (Ind. 1982).

<sup>32</sup>*Id.* at 676.

determined that, because its prior leniency was apparently misunderstood by Morris, a stronger sanction was needed.<sup>33</sup>

Repeated neglect by an attorney resulted in only a ninety-day suspension in *In re Brooks*<sup>34</sup> pursuant to the court's approval of an agreement for discipline by the parties. In contrast to *In re Lewis*<sup>35</sup> and *In re Levinson*,<sup>36</sup> where repeated misconduct resulted in disbarment, the agreed upon sanction in *Brooks* seems very lenient. Apparently significant was the finding that the parties recognized "mitigating circumstances which explain Respondent's conduct in the foregoing matters."<sup>37</sup> Unfortunately the mitigating circumstances the court seems to have relied upon were not enumerated, thus leaving any further distinction impossible.

Suspension was ordered for two years in *In re Callahan*<sup>38</sup> as a result of an extortion scheme. In 1969, respondent and his law partner were members of an association interested in public construction in East Chicago. At this same time, the Board of Sanitary Commissioners proposed the construction of a water pollution abatement project which respondent's association vigorously opposed. Later that year, respondent, his law partner, and the president of the association met with the superintendent of the Board and threatened to stop the project unless they were paid.<sup>39</sup> Although respondent did not actively participate, his partner coerced the superintendent to persuade the general contractor of the project to retain their law firm "ostensibly as legal counsel."<sup>40</sup> Over time, respondent's firm received \$55,000 as "attorneys fees for legal work" rendered for the contractor.<sup>41</sup> In determining the appropriate sanction, the court stated that it would consider "the specific acts of misconduct, this Court's responsibility to preserve the integrity of the Bar and the risk, if any, to which we will subject the public by permitting the Respondent to continue in the profession or be reinstated at some future date."<sup>42</sup>

Under these guidelines, the court found that, although Callahan did not orchestrate the extortion scheme, he acquiesced in the plan and participated in the spoils. The court noted that the temptation and availability of "easy money," which may always be present in the professional

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<sup>33</sup>*Id.*

<sup>34</sup>437 N.E.2d 47 (Ind. 1982).

<sup>35</sup>445 N.E.2d 987 (Ind. 1983).

<sup>36</sup>444 N.E.2d 1175 (Ind. 1983).

<sup>37</sup>437 N.E.2d at 49.

<sup>38</sup>442 N.E.2d 1092 (Ind. 1982).

<sup>39</sup>*Id.* at 1093.

<sup>40</sup>*Id.* at 1093-94.

<sup>41</sup>*Id.* at 1094. Respondent and his partner received approximately \$2,500 each month which they divided into three equal parts. The president of the association received one part, supposedly for consultant services. Respondent and his partner never performed any significant legal work.

<sup>42</sup>*Id.*

life of an attorney, "is the very reason for the existence of our professional rules of ethics."<sup>43</sup> The court discussed the mitigating circumstances present in *Callahan*. It noted that the extortion had occurred over twelve years ago with no evidence of other misconduct in the interim period. Callahan also voluntarily resigned as judge of the East Chicago City Court during these proceedings.<sup>44</sup> The court found, however, that neither inexperience nor naivete could justify even acquiescing in an extortion scheme.<sup>45</sup> The court did seem to consider inexperience and naivete in opting for a two year suspension over disbarment. Taking into account all these considerations, the court concluded that suspension was necessary to preserve the integrity of the Bar, but that "[Callahan] does not present such a risk as to preclude the possibility of reinstatement at a later date."<sup>46</sup>

*In re Roberts*<sup>47</sup> addressed an attorney's failure to promptly disclose his knowledge of the improper conduct of a juror. In a jury questionnaire, under penalty of perjury, the juror incorrectly identified his wife's employer. The juror's wife was actually employed as a secretary in the respondent's law firm. During voir dire, respondent did not question the juror about his wife's employment although he knew of the questionnaire, nor did he reveal the connection when counsel for the other side questioned the juror about his relationship with the respondent. Only after the jury had begun deliberations did the respondent disclose the relationship.<sup>48</sup> Roberts was suspended for six months.<sup>49</sup>

In *In re Leibowitz*,<sup>50</sup> the attorney was suspended for two years for, among other violations, entering into a prohibited business relationship with a client and neglecting legal matters.<sup>51</sup> After Leibowitz represented a client in a dissolution of marriage action in which the client received a substantial property settlement, the attorney borrowed \$25,000 from the client. In finding this constituted an improper business relationship, the court emphasized that a client should "be shielded from self-serving con-

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<sup>43</sup>*Id.* at 1095.

<sup>44</sup>*Id.* The court often applauds voluntary withdrawal from the judiciary as indicative of genuine remorse and a mitigating circumstance when determining the appropriate sanction. See, e.g., *In re Littell*, 260 Ind. 187, 294 N.E.2d 126 (1973); cf. *In re LeMaster*, 433 N.E.2d 787 (Ind. 1982) (court considered an attorney's voluntary withdrawal from practice in determining the effective date of a disciplinary sanction).

<sup>45</sup>442 N.E.2d at 1095.

<sup>46</sup>*Id.*

<sup>47</sup>442 N.E.2d 986 (Ind. 1983).

<sup>48</sup>*Id.* at 987. The court found that "[b]y his continued silence, [Roberts] violated a most fundamental precept of our judicial system, the impartiality and integrity of the jury." *Id.* at 988. The court did not consider Robert's disclosure to be a mitigating factor. *Id.* at 989. When the trial judge approached Roberts in order to resolve the matter of non-disclosure, Roberts retaliated by filing a frivolous grievance against him. *Id.* at 987. For discussion of this issue, see *supra* notes 6-16 and accompanying text.

<sup>49</sup>442 N.E.2d at 989.

<sup>50</sup>437 N.E.2d 973 (Ind. 1982).

<sup>51</sup>*Id.* at 974-75.

duct of his attorney.”<sup>52</sup> Finally, in *In re LeMaster*,<sup>53</sup> the court suspended an attorney for two years for violations of Regulation 10B-5 under the Securities Act of 1933. As an officer and director of LaPan Corporation, the attorney had made misrepresentations of fact and omitted material information in the sale of stock to investors.

c. *Conduct warranting public reprimand.*—During the survey period, the court addressed a wide variety of misconduct which warranted admonishment. In one proceeding, the court reprimanded an attorney appointed as appellate counsel in two criminal cases for failing to timely file both appeals.<sup>54</sup> In another criminal case, the attorney suggested that his friendship with the judge would help in reducing the bond of his client and later made his fee contingent upon the client's receipt of a lesser criminal penalty.<sup>55</sup> The survey period also saw an attorney reprimanded for communicating with a person he knew to be represented by an attorney on the subject matter of the representation<sup>56</sup> and another admonished for soliciting clients.<sup>57</sup>

The most common misconduct warranting a reprimand during the survey period was accepting employment with one client which was likely to affect adversely the attorney's independent judgment on behalf of another client.<sup>58</sup> In *In re Cissna*,<sup>59</sup> the court found that the attorney's

representation of a husband in a prior non-related matter, his representation of the family corporation and his subsequent representation of the wife in a marriage dissolution matter where the corporate assets became the subject of the property settlement agreement, portray the sort of division of loyalties that is prohibited by the rules of ethics.<sup>60</sup>

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<sup>52</sup>*Id.* at 974. The court focused on the fact that Leibowitz used knowledge gained during a professional relationship for his own benefit. *Id.* at 974-75.

<sup>53</sup>433 N.E.2d 787 (Ind. 1982).

<sup>54</sup>*In re Gibson*, 444 N.E.2d 852 (Ind. 1983). The court indicated that this neglect was based in part upon the client's financial status. The court concluded that Gibson betrayed the trust not only of his clients but also of the appointing court. *Id.* at 853.

<sup>55</sup>*In re Fasig*, 444 N.E.2d 849 (Ind. 1983). Such conduct constitutes a violation of both DR 9-101(c) and DR 2-106(c) (an arrangement for a contingent fee in a criminal case).

<sup>56</sup>*In re Mahoney*, 437 N.E.2d 49 (Ind. 1982).

<sup>57</sup>*In re Frank*, 440 N.E.2d 676 (Ind. 1982). Frank sent letters to unrepresented persons who had been charged with driving under the influence of alcohol, advising them of his success in plea bargaining such cases. The court found this solicitation went beyond the information limitation. *Id.* at 677. Justice Prentice, however, doubted that sanctions for solicitation had much effect and would have directed the Supreme Court Disciplinary Commission to submit a brief on the subject or to dismiss the case. *Id.* (Prentice, J., separate opinion). Cf. Order Amending Code of Professional Responsibility (Ind. Jan. 17, 1984).

<sup>58</sup>MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A), (B) (1971).

<sup>59</sup>444 N.E.2d 851 (Ind. 1983).

<sup>60</sup>*Id.* at 852. At the time of the property settlement agreement, Cissna tendered to the parties a release of him and his firm from any liability in this matter. The court found that this attempt to exonerate himself “aggravated his misconduct.” *Id.*

In *In re Keithley*,<sup>61</sup> the attorney represented the wife in a dissolution for marriage action. Before that proceeding was concluded, the client informed Keithley that she wished to obtain custody of her child from a prior marriage after the dissolution was final. Several months later, the father retained respondent to enforce the custody order, and respondent prepared a petition for contempt citation for him. When the wife arrived at respondent's office for her appointment, respondent served her with the contempt petition. The court concluded that respondent's conduct was "not merely inadvertent . . . dual representation of conflicting interests. The Respondent not only changed sides in a sensitive issue of child custody . . . but he did so in a particularly callous and reprehensible manner."<sup>62</sup>

Two cases addressed the related problem of the conflicts between an attorney's public and private duties. *In re O'Brien*<sup>63</sup> addressed a blatantly improper representation by an attorney serving in a judicial capacity. O'Brien was reprimanded for failing to disqualify himself as judge pro tempore of the Martin Circuit Court and entering a dissolution decree and property settlement in a case in which he represented the husband.<sup>64</sup> Although O'Brien acted in accordance with the parties' wishes, the court stated that "it is inherently improper to act as an advocate for one party in a controversy and then serve as a decision-making authority to resolve the conflict."<sup>65</sup> The court found the defendant's action to be an "obvious violation of a very basic principle of professional ethics."<sup>66</sup> In *In re Lantz*,<sup>67</sup> the court reviewed a case in which the attorney represented a person in a civil case while simultaneously representing the State in the prosecution of the same person. The court reiterated that "[t]he mere possibility of an adverse effect upon the exercise of his free judgment prevents a lawyer from representing clients with opposing interests."<sup>68</sup> The significance of these cases is the court's obvious insistence that attorneys keep their public legal roles absolutely free from conflict with their private practices.<sup>69</sup>

Another case resulting in a reprimand addressed an attorney's use of a client confidence to the disadvantage of the client and the advantage of himself. In *In re Roache*,<sup>70</sup> the respondent was retained to represent his client in the purchase of a business. After receiving the first counter-offer, the client insisted on dealing with the vendors directly. Shortly thereafter, the client called Roache for further consultation. The respondent

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<sup>61</sup>445 N.E.2d 997 (Ind. 1983).

<sup>62</sup>*Id.* at 998.

<sup>63</sup>437 N.E.2d 972 (Ind. 1982).

<sup>64</sup>*Id.* at 973. The wife was not represented by counsel. *Id.* at 972.

<sup>65</sup>*Id.* at 973.

<sup>66</sup>*Id.*

<sup>67</sup>442 N.E.2d 989 (Ind. 1982).

<sup>68</sup>*Id.* at 990.

<sup>69</sup>See *infra* notes 97-125 and accompanying text.

<sup>70</sup>446 N.E.2d 1302 (Ind. 1983).

informed the client that he could no longer represent him because he was now representing Roache's brother in the purchase of the same business.

The client then told the vendors that, because respondent no longer represented him, he could not commit himself to the closing. That same day, the respondent informed the vendors that the client was no longer interested. Roache then signed an offer to purchase the business. Several days later, after learning from the client's new attorney that the client was still interested, the respondent offered to assign his own interest in the business to the client. That offer was declined. Respondent later rescinded his offer to purchase the business, and the client eventually was able to buy it.

The court found that Roache's actions caused the client unnecessary delay and inconvenience in buying the business.<sup>71</sup> The court concluded that Roache had violated the Code of Professional Responsibility by using his position to his client's disadvantage and to his own advantage and by withdrawing "from employment without having taken reasonable steps to avoid foreseeable prejudice to the rights of his client."<sup>72</sup>

### *B. Non-Disciplinary Actions*

1. *The Unauthorized Practice of Law.*—During the survey period, the Indiana Supreme Court was twice called upon to restrain the unauthorized practice of law.

In *State v. Gould*,<sup>73</sup> the court held that a labor representative employed by the Indiana State Employees Association was not engaged in the practice of law when appearing before the State Employees' Appeals Commission on behalf of state employees.<sup>74</sup> Rejecting the findings of fact and conclusions of its appointed commissioner, the court found that the administrative nature of the hearing permitted representation by non-lawyers.

Pursuant to the State Personnel Act,<sup>75</sup> a state employee with an unsatisfactorily resolved complaint arising out of employment "may seek an appeal to the commission, which is charged with the duty of conducting a public hearing 'with the right to be represented and to present evidence.'"<sup>76</sup> Eli W. Gould, the respondent, appeared on behalf of a state employee before the Commission. Gould requested the issuance of subpoenas, made arguments, presented evidence, and examined and cross-examined witnesses.

The court treated these facts as a case of first impression in Indiana,

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<sup>71</sup>*Id.* at 1303.

<sup>72</sup>*Id.* at 1303-04.

<sup>73</sup>437 N.E.2d 41 (Ind. 1982).

<sup>74</sup>*Id.* at 43-44.

<sup>75</sup>IND. CODE § 4-15-2-1 (1982).

<sup>76</sup>437 N.E.2d at 42 (citing IND. CODE § 4-15-2-35 (1982)).

distinguishing it from previous unauthorized practice of law decisions<sup>77</sup> on the basis of Gould's representation before an administrative hearing. Despite arguments by the State that the Commission followed a judicial model and therefore required a skilled lawyer, the court determined that use of a judicial model was not dispositive.<sup>78</sup> Rather, the court looked to the confined nature of the hearing, "the character of the tribunal, the interests at stake, and the potential for ineptness in the representation to create a hazard for the public" in determining that the representation of a "complaining employee" before the Commission did not represent the practice of law.<sup>79</sup>

In *Gould*, the court provided some guidelines for determining if appearances before a state administrative agency constitute the practice of law. The court looked first to the potential for detriment to the person being represented. The court noted that members of the state Commission were not required to have legal training and concluded that "legal techniques and legal concepts would have a diminished impact"<sup>80</sup> before the Commission. Recognizing that the complaining employee had considerable interest in the hearing in terms of money and future employment, the court nonetheless found that because the possibility of appeal from the Commission's decision existed, the employee's interests would not suffer irrevocable harm. The court looked next to the "potential for detriment to the public from inept representation" and found such a potential "speculative" in that the hearing was part of a process taking place under "one roof" and limited to state employees.<sup>81</sup>

The unauthorized practice of law has long been a gray area of case law.<sup>82</sup> The *Gould* opinion is helpful in revealing countervailing factors for approving a practice which otherwise could be construed as unauthorized practice.

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<sup>77</sup>See generally *Professional Adjusters, Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982) (negotiating a disputed claim settlement between an insured and his insurance company constitutes the practice of law); *State ex rel. Indiana State Bar Ass'n v. Osborne*, 241 Ind. 375, 172 N.E.2d 434 (1961) (preparing and drafting a will or giving advice as to its legal effect is the practice of law); *Fink v. Pedan*, 214 Ind. 584, 17 N.E.2d 95 (1938) (giving legal advice to clients and transacting business connected with the law constitutes the practice of law); *Eley v. Miller*, 7 Ind. App. 529, 34 N.E. 836 (1893) (preparing legal instruments which secure legal rights is the practice of law).

<sup>78</sup>437 N.E.2d at 43.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>See *State v. Indiana Real Estate Ass'n*, 244 Ind. 214, 191 N.E.2d 711 (1963). There is a twilight zone between the area of activity which is clearly permitted to the layman, and that which is denied him.

Thus, the question which this court must determine is where, within this "twilight zone" it is proper to draw the line between those acts which are and are not permissible to persons who are not lawyers.  
*Id.* at 220-21, 191 N.E.2d at 714-15.

In *Professional Adjusters, Inc. v. Tandon*,<sup>83</sup> the supreme court declared unconstitutional an Indiana statute<sup>84</sup> which provided for the licensing of certified public insurance adjusters.<sup>85</sup> The court found that statute to be a violation of the sections of the Indiana Constitution which place exclusive control over the practice of law in the Indiana Supreme Court.<sup>86</sup>

Professional Adjusters filed suit against the Tandons whom it had represented in settling an insurance claim for a fire loss to the defendant's mobile home. The Tandons had agreed to pay a percentage of the insurance settlement in exchange for Professional Adjusters' assistance in adjusting their claim. This agreement was signed only by the Tandons who moved to dismiss, alleging that the contract was based upon an unconstitutional statute and was therefore unenforceable. The trial court granted the motion, agreeing that the Indiana statute which provided for licensing of certified public adjusters was unconstitutional.<sup>87</sup>

The supreme court held that Professional Adjusters' representation of the Tandons amounted to the unauthorized practice of law in that the plaintiff had formulated and submitted a claim for negotiation.<sup>88</sup> Even though a bargaining process of offer and counteroffer had not begun, the court held that Professional Adjusters had engaged in negotiation "by submitting a figure which [the Tandons] would deem acceptable for their loss and contemplating in return a response from the insurance carrier that would effect the settlement."<sup>89</sup> The court stated that negotiation of settlement under an insurance contract requires the interpretation of the terms of that contract and held that the statute which authorized such negotiation without admission to the bar was unconstitutional.<sup>90</sup>

Justice Hunter dissented.<sup>91</sup> He first argued that, because the contract

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<sup>83</sup>433 N.E.2d 779 (Ind. 1982).

<sup>84</sup>IND. CODE §§ 27-1-24-1 to -9 (1982). This statute provided in part:

(a) The term "Public adjuster" shall include every person or corporation who, or which, for compensation or reward, acts on behalf of, or aids in any manner, an assured, in negotiating for, or effecting, the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property . . . .

*Id.* § 27-1-24-1(a).

The Indiana Public Adjusters statute was amended in 1983. Act of Apr. 4, 1983, Pub. L. No. 257-1983, § 1, 1983 Ind. Acts. 1657, 1657-64 (codified at IND. CODE §§ 27-1-27-1 to -11 (Supp. 1983)) (repealing IND. CODE §§ 27-1-24-1 to -9 (1982)). For further discussion of this statute, see Arthur, *Insurance, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 240 (1984).

<sup>85</sup>433 N.E.2d at 783.

<sup>86</sup>IND. CONST. art. VII, § 4, art. III, § 1.

<sup>87</sup>433 N.E.2d at 780.

<sup>88</sup>*Id.* at 782. Although the court recognized that the issue was not before it, it indicated that no contract between Professional Adjusters and the Tandons may have occurred. *Id.* at 781. Because no representative of the plaintiff had signed the agreement, the court suggested that the writing was merely an assignment without consideration. *Id.*

<sup>89</sup>*Id.* at 782.

<sup>90</sup>*Id.* at 783.

<sup>91</sup>*Id.* at 784 (Hunter, J., dissenting).



was unenforceable without Professional Adjusters' signature, the court did not have to address the statute's constitutionality. Further, Justice Hunter stated that Professional Adjusters' acts did not constitute the practice of law.<sup>92</sup> He argued that if the reasoning of the majority was valid, then adjusters working for insurance companies also engage in the practice of law. Justice Hunter stated that "no valid distinction" exists between the services performed by a public adjuster and an insurance administrator or claims representative who negotiates settlements for insurance companies under the authority of other Indiana statutes.<sup>93</sup> Therefore, Justice Hunter concluded that public adjusters and insurance company adjusters negotiate the same contractual rights which the majority held necessitated a licensed attorney's involvement.<sup>94</sup>

In *Professional Adjusters*, the court indicated that acts performed by agents in negotiating insurance settlements constitute the practice of law if the agent represents the public but do not constitute the practice of law if he represents a corporation. Therefore, although the court clearly based its determination on the act of contract interpretation, representation of the general public actually controls. As Justice Hunter points out in his dissent, the majority did not consider the protection of public interest built into the certified public adjuster statute by the Indiana Legislature.<sup>95</sup> This protection, coupled with the expediency of using competent, trained settlement experts, Justice Hunter argued, should prevent the public from being "deprived of the same nonlegal assistance in the matter of out-of-court settlements which insurers enjoy."<sup>96</sup>

2. *Conflicts of Interest*.—Two cases during the survey period dealt with prior representation and the "substantial relationship" test.<sup>97</sup>

In *Simmon's, Inc. v. Pinkerton's, Inc.*,<sup>98</sup> the defendant, Pinkerton's, moved to disqualify plaintiff's counsel, who were members of a firm which had represented Pinkerton's in a previous action. The magistrate denied

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<sup>92</sup>*Id.*

<sup>93</sup>*Id.* See IND. CODE §§ 27-1-25-1, 27-8-4-10 (1982).

<sup>94</sup>433 N.E.2d at 784 (Hunter, J., dissenting).

<sup>95</sup>*Id.* at 786. For example, Indiana Code sections 27-1-24-1 to -9 provided for the regulation of public adjusters by the Commissioner of Insurance; the licensing of public adjusters only after passing a written examination; sanctions such as probation, suspension, or revocation of an adjuster's license; and prohibitions against counseling clients to refrain from seeking legal advice.

<sup>96</sup>433 N.E.2d at 787 (Hunter, J., dissenting). Justice Hunter noted that "public adjusters" are commonplace in the United States. He stated that in no other jurisdiction has a public adjuster statute been held unconstitutional. *Id.*

<sup>97</sup>The substantial relationship test was formulated in *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). The test is used to determine whether a prior representation of a client by a particular law firm has revealed such confidences and secrets of that client that present representation of a third party by that same firm against that client violates Canons 4 and 9 of the Model Code of Professional Responsibility. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982).

<sup>98</sup>555 F. Supp. 300 (N.D. Ind. 1983).

the disqualification motion, concluding that no substantial relationship existed between the two representations. The United States District Court for the Northern District of Indiana reviewed de novo.<sup>99</sup>

In *Simmon's*, plaintiff's attorneys were members of the firm of Robins, Zelle, Larson & Kaplan which had in an earlier case, *Guardsmark v. WCCO-TV*,<sup>100</sup> represented Pinkerton's. The firm at the time of the *Guardsmark* representation had different members and used the name of Robins, Davis & Lyons. Pinkerton's alleged that the attorneys who continued from the predecessor to the present firm had gained confidential information during the *Guardsmark* representation, which was presumed to be within the knowledge of all attorneys in the current Robins firm, requiring the firm's disqualification.<sup>101</sup>

The district court, in its de novo review, followed closely the analysis used by the Seventh Circuit Court of Appeals in *Freeman v. Chicago Medical Instrument Co.*<sup>102</sup> That decision reflected a careful balancing of ethical and practical considerations. The court in *Freeman* termed disqualification "a drastic measure which courts should hesitate to impose except when absolutely necessary."<sup>103</sup> The *Freeman* court urged caution in granting disqualification motions because they terminate an existing attorney-client relationship of the client's choosing and because they present the potential for harassment.<sup>104</sup> The *Freeman* court noted that strictly applied disqualification rules " 'might seriously jeopardize [young lawyers'] careers by temporary affiliation with large law firms.' "<sup>105</sup> The court also noted that clients might suffer an adverse effect because disqualification rules could cause " 'difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporally remote connections with attorneys for the other side.' "<sup>106</sup>

As in *Freeman*, the *Simmon's* court employed a two-step analysis in determining whether disqualification was warranted. The court asked: "(1) Is there a 'substantial relationship' between the *Guardsmark* representation . . . and the instant litigation . . . that will raise a rebuttable presumption that confidential information is possessed . . . ? (2) If the presumption has arisen, . . . [has it been rebutted]?"<sup>107</sup>

To determine if a "substantial relationship" existed under the first inquiry, the court must follow three steps. First, it must " 'make a fac-

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<sup>99</sup>*Id.* at 302.

<sup>100</sup>*Guardsmark* was settled prior to trial. *Id.* at 303.

<sup>101</sup>*Id.* at 302.

<sup>102</sup>689 F.2d 715 (7th Cir. 1982).

<sup>103</sup>*Id.* at 721.

<sup>104</sup>*Id.* at 721-22.

<sup>105</sup>*Id.* at 723 n.11 (quoting *Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)).

<sup>106</sup>689 F.2d at 723 n. 11 (quoting *Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)).

<sup>107</sup>555 F. Supp. at 303.

tual reconstruction of the scope of the prior legal representation.' ”<sup>108</sup> Second, the court must determine “ ‘whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters.’ ”<sup>109</sup> Finally, the court must determine whether “ ‘the information is relevant to the issues raised in the litigation pending against the former client.’ ”<sup>110</sup>

Finding no previous case law on the movant's burden of proof, the *Simmon*'s court accepted “any logical factual reconstruction” which can support the movant's contention as to the scope of prior representation.<sup>111</sup> However, the court concluded that the limited scope of the *Guardsmark* representation did not support the inference, required in the second step, that during the prior representation confidential information was transmitted.<sup>112</sup> Thus, the court held that no “substantial relationship” existed.<sup>113</sup>

The court stated that, even if a substantial relationship had been established, the presumption of shared confidences would have been rebutted by the contents of uncontroverted affidavits filed by plaintiff's counsel. In these affidavits, *Simmon*'s counsel denied having access to the *Guardsmark* files and denied having any discussions with other firm attorneys on the subject of *Guardsmark*. These affidavits revealed that the Robins firm had taken special care in isolating the *Simmon*'s attorneys from the *Guardmark* files.<sup>114</sup> The court found that these uncontroverted affidavits, taken together, were sufficient to rebut the presumption of revealed confidences.<sup>115</sup>

The *Simmon*'s decision reveals the substantial barriers erected by the courts to successful motions for disqualification of counsel. Movants who first satisfy strict criteria to establish a substantial relationship between prior and present representation hold only a rebuttable presumption that the confidences have been revealed. This presumption, once attained, is at best tenuous. The *Simmon*'s decision indicates that the standards for rebuttal will not be high.

Several months before the district court's decision in *Simmon*'s, the Indiana Supreme Court had occasion to discuss the substantial relationship test in a case of first impression in Indiana, *State v. Tippecanoe*

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<sup>108</sup>*Id.* at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953))).

<sup>109</sup>555 F. Supp. at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953))).

<sup>110</sup>555 F. Supp. at 302 (quoting *Freeman*, 689 F.2d at 722 n.10 (quoting *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953))).

<sup>111</sup>555 F. Supp. at 303.

<sup>112</sup>*Id.* at 304.

<sup>113</sup>*Id.*

<sup>114</sup>The *Guardsmark* files were reduced to microfilm and all attorneys involved in actions relating to Pinkerton's were denied access. *Id.* at 305.

<sup>115</sup>*Id.*

*County Court*.<sup>116</sup> In *Tippecanoe*, the court was called upon to decide "whether the entire office of the prosecuting attorney in one county should be disqualified because the elected prosecuting attorney was previously a defense attorney for the accused in two prior cases."<sup>117</sup> Under the facts, John Meyers, Tippecanoe County Prosecutor, charged the defendant (Smith) with theft and with being an habitual offender. Meyers had previously defended Smith on two charges while serving as a public defender.

First, the court in *Tippecanoe* used a substantial relationship test in determining whether Meyers should have been disqualified. The court determined that Smith's earlier representations by Meyers had no relation to the present theft case.<sup>118</sup> The court, however, found that the habitual offender charge was based upon the two prior offenses and, therefore, that a substantial relationship existed.<sup>119</sup> The court held that, because it could not "say without speculation that the prosecutor's knowledge of those prior cases [would] not actually result in prejudice to [the] defendant," Meyers must be disqualified.<sup>120</sup>

After disqualifying Meyers, the court then turned to the question of disqualification of Meyers' entire staff. The court noted that, while disqualification of an entire firm when one member is disqualified is strictly enforced in civil actions, it is not as strictly applied against government agencies. This distinction is based upon the absence of a common financial interest among members of the government agency.<sup>121</sup> Citing *State ex rel. Goldsmith v. Superior Court*,<sup>122</sup> the court stated that, because of this distinction, disqualification of a *deputy* prosecutor does not always require a "recusation of the entire staff of the prosecutor."<sup>123</sup> However, the court found that, because the prosecutor had administrative control over his staff, when the prosecutor himself was disqualified, "his entire staff

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<sup>116</sup>432 N.E.2d 1377 (Ind. 1982).

<sup>117</sup>*Id.* at 1378.

<sup>118</sup>*Id.* at 1379.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.* The court found that "public trust in the integrity of the judicial process" required it "to resolve any serious doubt in favor of disqualification." *Id.*

<sup>121</sup>*Id.* The court quoted from *State ex rel. Goldsmith v. Superior Court*, 270 Ind. 487, 386 N.E.2d 942 (1979), as follows:

The relationship between the prosecuting attorney and his sole client, the citizens of the circuit in which he serves, is fundamentally and decisively different from a lawyer and the ordinary attorney-client relationship. The lawyers in a law firm have a common financial interest in the case whereas the deputies in a prosecutor's office have an independent duty by law to represent the State of Indiana in criminal matters. Their relationship to each other, rather than pecuniary, is no more than sharing the same statutory duties; and the interest of one deputy which requires him to testify will ordinarily have no financial or personal impact on the other deputies in the office. Thus, there is no reason to recuse the entire staff of deputies of the prosecuting attorney when one deputy becomes a witness in a case handled by the office.

432 N.E.2d at 1379 (quoting *Goldsmith*, 270 Ind. at 490, 386 N.E.2d at 945).

<sup>122</sup>270 Ind. 487, 386 N.E.2d 942 (1979).

<sup>123</sup>432 N.E.2d at 1379.

of deputies must be recused in order to maintain the integrity of the process of criminal justice.' ”<sup>124</sup>

Appointment of a special prosecutor is a costly proposition for Indiana county governments. The *Tippecanoe* decision deters the election of experienced attorneys within the county because past representations will probably prevent them and their entire staff from performing their elected duties. The decision is likely to prove particularly detrimental in the smaller Indiana counties which have part-time prosecutors. The possibility of conflicts is even stronger where the prosecutor concurrently conducts a part-time private practice. Recent decisions such as *Tippecanoe*<sup>125</sup> have made it increasingly difficult for prosecutors to practice outside their elected offices. In counties where prosecutor's salaries are small, this inability to obtain additional income from private practice may well dissuade qualified attorneys from seeking office.

Although the *Simmon's* decision held that the presumption of shared confidences is rebuttable and does not absolutely require disqualification in civil actions, it is unlikely that the *Simmon's* decision will prevent disqualification of prosecutors' staffs. The *Simmon's* court allowed the presumption to be rebuttable in the interest of a client's right to choose an attorney. That choice being absent, the courts will probably avoid any appearance of conflict in order to uphold the public's trust in the integrity of the criminal justice system.

3. *Attorney-Client Contracts*.—In *Whitehouse v. Quinn*,<sup>126</sup> the Second District Court of Appeals concluded that a twenty-year statute of limitations should apply to legal malpractice actions based on certain types of contracts.<sup>127</sup>

Appellant, David Whitehouse, entered into a written contingent fee contract with appellee, Thomas Quinn, Jr. for Quinn's representation of Whitehouse on a personal injury claim. In this contract, Quinn agreed “ ‘to represent and prosecute [Whitehouse's personal injury] claim to final settlement or judgment . . . against several defendants, including Russell A. Toothman, Michael Vaccarello, Kathie K. Christy and others.’ ”<sup>128</sup> Quinn recovered from Toothman and from Vaccarello. As part of the Vaccarello recovery, Whitehouse executed a release which discharged anyone associated with Whitehouse's injury from further liability. Approximately three years later, Whitehouse filed an action against Quinn based on one count of negligence and one count of breach of the contingent fee contract, claiming Quinn had failed “ ‘to secure all of the remedies

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<sup>124</sup>*Id.* (quoting *Goldsmith*, 270 Ind. at 491, 386 N.E.2d at 945).

<sup>125</sup>*See, e.g., In re Lantz*, 442 N.E.2d 989 (Ind. 1982), discussed *supra* text accompanying notes 67-68.

<sup>126</sup>443 N.E.2d 332 (Ind. Ct. App. 1982).

<sup>127</sup>*Id.* at 337.

<sup>128</sup>*Id.* at 334 (quoting from the contingent fee contract).

available.’”<sup>129</sup> The trial court granted Quinn’s motion for summary judgment, holding Whitehouse’s complaint to be governed and barred by the two-year statute of limitations period of Indiana Code section 34-1-2-2.<sup>130</sup>

On appeal, the court addressed the narrow issue of whether “an action against an attorney based upon that attorney’s professional services was exclusively an action for legal malpractice based upon negligence.”<sup>131</sup> The court relied on the nineteenth century decision, *Foulks v. Fall*,<sup>132</sup> and stated that “a claim predicated upon the nonperformance of an *express* promise contained in a written attorney-client contract . . . is governed by the statute of limitation applicable to written contracts.”<sup>133</sup> The court indicated that the statute of limitations for written contracts will attach whenever the “attorney-client contract . . . bears more than a remote or indirect connection with [the plaintiff’s] claim, and the contract is more than a mere link in the chain of evidence needed to state the claim.”<sup>134</sup>

The court reasoned that its conclusion was consistent with the Indiana Supreme Court’s holding in *Shideler v. Dwyer*.<sup>135</sup> *Shideler* established that the applicable statute of limitation is determined by “the nature or substance of the cause of action” and not by “pleading technicalities.”<sup>136</sup> In *Shideler*, the court found the plaintiff’s negligence claim against an attorney to be governed by the two-year statute of limitations applicable to loss of interest in personal property.<sup>137</sup> The *Whitehouse* court distinguished *Shideler*, noting that the plaintiff in *Shideler* was neither the attorney’s client nor a party to an express contract.<sup>138</sup>

Although the court of appeals held that Whitehouse’s action in contract was not barred by the applicable limitations period, it determined that the two-year statute of limitations barred his negligence claim based upon Quinn’s failure to disclose the effect of the release.<sup>139</sup> Relying on a medical malpractice decision, *Guy v. Shuldt*,<sup>140</sup> the court found that

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<sup>129</sup>*Id.* (quoting for Count I of the Complaint).

<sup>130</sup>The court cited to IND. CODE ANN. § 34-1-2-2 (Burns 1973) (current version at IND. CODE § 34-1-2-2(1) (1982)).

<sup>131</sup>443 N.E.2d at 336.

<sup>132</sup>91 Ind. 315 (1883).

<sup>133</sup>443 N.E.2d at 337 (citing *Foulks*, 91 Ind. at 321) (emphasis added).

<sup>134</sup>443 N.E.2d at 337.

<sup>135</sup>417 N.E.2d 281 (Ind. 1981).

<sup>136</sup>*Id.* at 285-86.

<sup>137</sup>*Id.* at 288. For comment on the *Shideler* decision, see MacGill, *Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 297 (1981).

<sup>138</sup>443 N.E.2d at 338.

<sup>139</sup>*Id.* at 339.

<sup>140</sup>236 Ind. 101, 138 N.E.2d 891 (1956). The *Whitehouse* court reasoned that the supreme court had “declared constructive or passive fraud operates to toll the statute where a fiduciary relationship exists and the fiduciary fails to disclose material information to his charge.” 443 N.E.2d at 339 (citing *Guy*, 236 Ind. at 109, 138 N.E.2d at 895). The *Whitehouse* court quoted from *Guy* as follows:

the statute had begun to run when the attorney-client relationship had ended and the client could no longer rely on the attorney's duty to inform.<sup>141</sup>

The *Whitehouse* decision clarifies the uncertainty that has long existed as to the effects of fraudulent concealment upon the accrual of a cause of action for legal malpractice. It can now be concluded that the two-year statute of limitations based upon a negligence claim for legal malpractice can be avoided if a client alleges fraudulent concealment and the attorney-client relationship has not terminated.

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“[W]here the duty to inform exists by reason of a confidential relationship, when that relationship is terminated the duty to inform is also terminated; concealment then ceases to exist. *After the relationship of physician and patient is terminated the patient has full opportunity for discovery and no longer is there a reliance by the patient nor a corresponding duty of the physician to advise or inform. The statute of limitations is no longer tolled by any fraudulent concealment and begins to run.*”

443 N.E.2d at 339 (quoting *Guy*, 236 Ind. at 109, 138 N.E.2d at 895) (emphasis added by *Whitehouse* court).

<sup>141</sup>443 N.E.2d at 339.

## XII. Property

SANDRA ROTHBAUM\*

JAMES N. SCAHILL\*\*

### A. Bailments

During the survey period the Indiana Supreme Court vacated the court of appeal's decision in *Carr v. Hoosier Photo Supplies, Inc.*,<sup>1</sup> Indiana's first film processing case. The plaintiff, an attorney who presumably was familiar with the recent Washington Supreme Court decision upholding a \$7,500 damage award for the loss of several reels of movie film,<sup>2</sup> had taken many photographs during a trip to Europe. After returning from his vacation, the plaintiff delivered eighteen rolls of film to Hoosier Photo Supplies, Inc. (Hoosier). When only fourteen of the rolls were returned, the plaintiff sued both Hoosier and Eastman Kodak Co. (Kodak), which was to have processed the film, for damages resulting from the loss of the four rolls of film.<sup>3</sup> The defendants stipulated that either Hoosier or Kodak had lost the film, and the plaintiff sought \$10,000 in damages. The Indiana Court of Appeals had upheld the trial court's award of \$1,013.60 in damages.<sup>4</sup> The Indiana Supreme Court vacated this decision and held that the plaintiff was entitled to no damages beyond the cost of replacing the four rolls of lost film.<sup>5</sup>

The supreme court agreed with the conclusion of both the trial and appellate courts that the law of bailments and not the Uniform Commercial Code<sup>6</sup> applied.<sup>7</sup> The principal issue was the legal effect of two notices

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<sup>1</sup>441 N.E.2d 450 (Ind. 1982), *vacating*, 422 N.E.2d 1272 (Ind. Ct. App. 1981).

<sup>2</sup>*Mieske v. Bartell Drug Co.*, 92 Wash. 2d 40, 593 P.2d 1308 (1979) (applying the Uniform Commercial Code and not the law of bailments).

<sup>3</sup>441 N.E.2d at 452.

<sup>4</sup>422 N.E.2d at 1278. For a discussion of the appellate court decision, see Bepko, *Commercial Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 83, 90 (1983) and Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 288 (1983). For a general discussion of "film processing cases" see Annot., 6 A.L.R. 4TH 934 (1981).

<sup>5</sup>441 N.E.2d at 456.

<sup>6</sup>IND. CODE §§ 26-1-1-101 to 1-10-106 (1982 & Supp. 1983). Section 26-1-2-618 provides that parties may limit liability so long as such limitation is not unreasonable; and section 26-1-2-302 gives the court the power to refuse to enforce unconscionable contract clauses. Therefore, even though declining to apply the Indiana Uniform Commercial Code, the supreme court applied an analysis essentially identical to one which could have occurred under Indiana's version of the U.C.C.

<sup>7</sup>441 N.E.2d at 453. *But see* *Mieske v. Bartell Drug Co.*, 92 Wash. 2d 40, 593 P.2d 1308 (1979).



purporting to limit the liability of Kodak.<sup>8</sup> A notice appearing on the packages of film when purchased stated that if the film was "damaged or lost by us or any subsidiary company even though by negligence or other fault," the film would be replaced. "Except for such replacement," the notice continued, "the sale, processing, or other handling of this film for any purpose is without other warranty or liability."<sup>9</sup> A second notice, appearing on the back of the receipt given to the plaintiff by Hoosier when the film was brought in for processing, stated:

Although film price does not include processing by Kodak, the return of any film or print to us for processing or any other purpose, will constitute an agreement by you that if any such film or print is damaged or lost by us or any subsidiary company, even though by negligence or other fault, it will be replaced with an equivalent amount of Kodak film and processing and, except for such replacement, the handling of such film or prints by us for any purpose is without other warranty or liability.<sup>10</sup>

The supreme court disagreed with the appellate court's conclusion that the statement limiting liability on the receipts given to Carr by Hoosier was ambiguous.<sup>11</sup> The court found that both notices referred to Kodak and were actually receipts from that company.<sup>12</sup> However, the court found that Hoosier was included in the disclaimer notice to the extent that Hoosier was acting as Kodak's agent in the transaction.<sup>13</sup>

Carr admitted familiarity with notices of the type promulgated by Kodak; however, he asserted that he had not actually read the two notices.<sup>14</sup> The court found that the case did not involve such disparate bargaining power that would make the liability-limiting clauses unconscionable and concluded that Carr had assented to those clauses.<sup>15</sup> The court reasoned that because Carr practiced as an attorney in the field of business law and admitted his awareness and understanding of the clauses, he was not in an inferior bargaining position.<sup>16</sup> Similarly, the court reasoned that Carr's knowledge of the clauses, combined with his delivery of the film to Hoosier for processing, established his consent to the terms of the clauses.<sup>17</sup> The court's ruling leaves unclear, however, whether less

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<sup>8</sup>441 N.E.2d at 452-53.

<sup>9</sup>*Id.* at 452.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 453.

<sup>12</sup>*Id.* at 453-54.

<sup>13</sup>*Id.* at 454.

<sup>14</sup>*Id.* at 455.

<sup>15</sup>*Id.* at 456.

<sup>16</sup>*Id.* at 455.

<sup>17</sup>*Id.* at 456.

sophisticated persons might be able to obtain a ruling that the contract was unconscionable or that consent was absent.

In support of its holding that the limitation of liability was not unconscionable, the court advanced the somewhat questionable proposition that the plaintiff was not in a take-it-or-leave-it position. The court reasoned that Carr might have processed the film himself, or found a processor willing to accept the film on terms different than Kodak's.<sup>18</sup> Other courts have relied on different rationales to refuse large damage awards in similar cases.<sup>19</sup> In *Bowes v. Fox-Stanley Photo Products, Inc.*,<sup>20</sup> for example, a Louisiana court held that non-pecuniary damages were not within the contemplation of the defendant when the contract was entered and were not recoverable.<sup>21</sup> The court indicated, however, that acceptance of the film by the defendant with notice of the special intellectual value of the film could make the defendant liable for non-pecuniary damages.<sup>22</sup>

### B. Deeds

In *Hemenway Memorial Presbyterian Church v. Aigner*,<sup>23</sup> the Indiana Court of Appeals was asked to determine the ownership of property known as the "Dr. T.D. and Emma Hart Scales Park." The property had been deeded to the State in 1933 by an instrument which provided in part:

It is further hereby especially agreed that should the grantee fail or refuse to maintain the same for the use contemplated and herein provided, for a period of three consecutive years, then the same shall revert to the grantors and/or the survivor should they be living, and should the same occur after the death of said grantors, then the same shall be owned by and the same is hereby conveyed and transferred to the Trustees of Hemenway Memorial Church of Boonville, and their successors in office.<sup>24</sup>

In 1972, because the Indiana State Legislature had determined that the War-  
rick County Commissioners could more appropriately administer the park,

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<sup>18</sup>*Id.* at 455.

<sup>19</sup>*See* Annot., 6 A.L.R. 4TH 923 (1981).

<sup>20</sup>379 So. 2d 844 (La. Ct. App. 1980).

<sup>21</sup>*Id.* at 847.

<sup>22</sup>*Id.* at 846. The court in *Bowes* also found that the clause which purported to limit liability and appeared on the receipt given the plaintiff was ineffective. The court reasoned that the defendant had not explained or pointed out the clause to the plaintiff and that lacking special knowledge of the disclaimer, the plaintiff was not bound by it. *Id.*

Bailment was also raised in *Tucker v. Capital City Riggers*, 437 N.E.2d 1048 (Ind. Ct. App. 1982). In that case the Indiana Court of Appeals held that possession lawfully obtained under a contract of bailment could not lawfully be extended merely because the bailor had failed to pay the bailee an amount owed under an unrelated contract. *Id.* at 1053.

<sup>23</sup>443 N.E.2d 93 (Ind. Ct. App. 1982).

<sup>24</sup>*Id.* at 94.

the State conveyed the property to Warrick County by quitclaim deed. The deed provided that if the property was no longer used as a general recreation area, the State had a right to cause ownership to revert to the State, i.e., the State had a right of re-entry.<sup>25</sup>

The church brought an action against the State of Indiana and the Warrick County Commissioners to enforce the church's right to the property.<sup>26</sup> The 1933 deed created a reversion in the grantors during the joint lives of the grantors and a subsequent executory interest in the church trustees.<sup>27</sup> The church contended that the deed created a public trust with the State as trustee and that to allow the park to be maintained by another entity would, in effect, rewrite the deed.<sup>28</sup> The State countered that the intent of the grantor was to have the property maintained as a recreation area.<sup>29</sup> The court agreed with the church and ordered that the property be transferred to the trustees of the church.<sup>30</sup>

Courts have generally refused to allow governmental units to sell property dedicated for use as parks.<sup>31</sup> However, in this case, the 1972 deed from the State to the county contained the stipulation that if the property were used for other than a park or recreation area, the State had a right of re-entry.<sup>32</sup> While a right of re-entry might appear to be an adequate provision for carrying out the intention of the grantors, under a right of re-entry the State might ignore a contrary use of the property and allow title to remain in Warrick County. Had the deed to the county contained instead a possibility of reverter in the State, which reversion would automatically revest ownership in the State upon contrary use of the property, enforcement of the wishes of the original grantors might have been more easily accomplished. The court did not consider this issue, but held simply that the State could not alienate the property.<sup>33</sup>

### C. Easements

In *Bulatovich v. Easton*,<sup>34</sup> the Indiana Court of Appeals affirmed a trial court decision granting the plaintiffs a prescriptive easement across

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<sup>25</sup>*Id.*

<sup>26</sup>443 N.E.2d at 93. The court did not discuss why the action was brought by the church and not by the trustees, who held the executory interest.

<sup>27</sup>It might be noted that the deed did not violate the rule against perpetuities, since the grant was to a public or charitable organization. See IND. CODE § 23-10-2-11 (1982); *Herron v. Stanton*, 79 Ind. App. 683, 147 N.E. 305 (1920).

<sup>28</sup>443 N.E.2d at 94.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 95.

<sup>31</sup>See Annot., 18 A.L.R. 1246 (1922); Annot., 63 A.L.R. 484 (1929); Annot., 144 A.L.R. 486 (1943).

<sup>32</sup>443 N.E.2d at 94.

<sup>33</sup>*Id.*

<sup>34</sup>435 N.E.2d 997 (Ind. Ct. App. 1982).

the defendants' property.<sup>35</sup> To gain a prescriptive easement, a party must "establish an actual, open, notorious, continuous, uninterrupted, adverse use [of the property] for twenty years under a claim of right, or show such continuous adverse use with [the owner's] knowledge and acquiescence."<sup>36</sup> In the present case, the issue was whether the use of a graveled area as a driveway was adverse to the owners' use of the property.<sup>37</sup> The court stated that a showing of open and continuous use creates the rebuttable presumption that the use is adverse.<sup>38</sup> The owner attempted to rebut the presumption by claiming that the plaintiffs' use of the area did not interfere with the owners' use.<sup>39</sup> The court found that the owners used the graveled area for parking, and that in order for the graveled area to be used simultaneously as a driveway and a parking area, the owners had to park their cars close to their house.<sup>40</sup> Moreover, when the owners wished to block the driveway for parking, they asked permission of the plaintiffs. The appellate court upheld the trial court's finding that the use of the area as a driveway was adverse to the defendants' use of the property.<sup>41</sup>

In *Kanizer v. White Excavating, Inc.*,<sup>42</sup> the court reiterated the long-standing rule that, absent the express granting of an openway, the owner of the servient estate "may maintain a gate across an easement for a right-of-way where that right-of-way terminates on his land"; but the servient estate holder "may not lock the gate or in any way interfere with [the dominant tenant's] reasonable use of the right-of-way."<sup>43</sup>

#### D. Gifts

Two cases concerning gifts of property were decided during the survey period. In *Rogers v. Rogers*,<sup>44</sup> a father sued his son for the return of funds withdrawn from a joint bank account by the son. The son contended that the father had made a gift to the son of the funds in the account.<sup>45</sup> The court stated that in order to make an inter vivos gift of property, a party must have a donative intent and must irrevocably surrender dominion and control over the property.<sup>46</sup> However, unless a joint

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<sup>35</sup>*Id.* at 999.

<sup>36</sup>*Id.* at 998.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* (citing *Searcy v. LaGrotte*, 175 Ind. App. 498, 372 N.E.2d 755 (1978)).

<sup>39</sup>435 N.E.2d at 998.

<sup>40</sup>*Id.* at 998-99.

<sup>41</sup>*Id.* at 999.

<sup>42</sup>444 N.E.2d 353 (Ind. Ct. App. 1982).

<sup>43</sup>*Id.* at 354.

<sup>44</sup>437 N.E.2d 92 (Ind. Ct. App. 1982).

<sup>45</sup>The son also argued on appeal that because both he and his father had signed the account's signature card, the son had a right to withdraw the funds. *Id.* at 95. The court ruled that the son had waived this argument by failing to raise it in the trial court. *Id.*

<sup>46</sup>*Id.* at 96.

tenant is incapable of withdrawing funds, the deposit of funds into a joint account cannot strip a party of dominion and control over the funds. Therefore, the focus must be on the intent of the alleged donor. The general assumption is that a person who deposits funds in a joint account does not intend to make an irrevocable gift of all or any part of the funds in the account.<sup>47</sup> This assumption was incorporated into Indiana Code section 32-3-1.5-3, which provides that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."<sup>48</sup>

In *Rogers*, the son claimed that by signing the signature card the father had demonstrated his intent to give the funds to the son.<sup>49</sup> The court distinguished the present case from *Moore v. Bowyer*,<sup>50</sup> in which the court held that an inter vivos gift from a mother to her son was intended where the mother had been ill and the son had a power of attorney to withdraw funds from the mother's accounts. The signature card signed by the mother in *Moore* stated that "any funds placed in . . . the account by any one of the parties is and shall be conclusively intended to be a gift . . . to the other signatory."<sup>51</sup> Unlike the signature card involved in *Moore*, the card signed by the father in *Rogers* was found to contain no express intention to make a gift to the son.<sup>52</sup> The court found that the son's own testimony established that the father's intent was to permit the son to withdraw funds for the father if he became ill and unable to do so.<sup>53</sup> Thus, the court affirmed the trial court's order that the son return the funds to his father.<sup>54</sup>

In *Larabee v. Booth*,<sup>55</sup> the defendant, Larabee, owned a remainder interest in real property subject to a life estate in her mother. The plaintiffs wanted to build a house on the property. Larabee agreed to convey the land to the Booths as a gift when she acquired fee simple title. Larabee, with her husband, executed a document which stated that they agreed to convey the property "at the time that we acquire a fee simple title and the expiration of the outstanding life estate."<sup>56</sup> The Booths constructed a house on the land, and when Larabee refused to supply a deed to the property, the Booths brought suit to compel Larabee to convey the prop-

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<sup>47</sup>IND. CODE ANN. § 32-4-1.5-3 official comment to Uniform Probate Code (West 1979), quoted in *Rogers*, 437 N.E.2d at 96.

<sup>48</sup>437 N.E.2d at 96 (quoting IND. CODE § 32-4-1.5-3(a) (1982)).

<sup>49</sup>437 N.E.2d at 95.

<sup>50</sup>180 Ind. App. 429, 388 N.E.2d 611 (1979). For a further discussion of the *Moore* case, see Falender, *Property, 1980 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 343, 364 (1980).

<sup>51</sup>180 Ind. App. at 431, 388 N.E.2d at 612.

<sup>52</sup>437 N.E.2d at 97.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>437 N.E.2d 1010 (Ind. Ct. App. 1982).

<sup>56</sup>*Id.* at 1010.

erty to them.<sup>57</sup> The court of appeals reversed the trial court decision ordering Larabee to convey the property.<sup>58</sup> The appellate court held that a written promise to transfer property in the future did not constitute a gift.<sup>59</sup> The court listed the requirements for a valid inter vivos gift: donor competency, free will, completion of the gift, delivery and acceptance of the property, and immediate and absolute effect.<sup>60</sup> The court found that the gift was not complete because the deed had not been conveyed, and that it was not immediately effective as the property was to be transferred at some future date.<sup>61</sup>

The court did not expressly state the rationale usually relied on in this type of case—that a court will not enforce a promise unsupported by consideration.<sup>62</sup> The plaintiffs in *Larabee* might have invoked the doctrine of promissory estoppel, an equitable doctrine holding that a promise unsupported by consideration may be enforceable if (1) the promisor should reasonably have foreseen that his promise would induce reliance by the promisee, (2) the promisee did in fact materially change position in reliance on the promise, and (3) justice requires that the promise be enforced.<sup>63</sup> On facts substantially similar to *Larabee*, the supreme court, in *Horner v. McConnell*,<sup>64</sup> compelled conveyance of real property from a father and his wife to his daughter and her husband. In *Horner*, the daughter and her husband had taken possession of and made substantial improvements on the property in reliance on the owners' promise to convey the land as a gift. In that case the court held that the younger couple's expenditure of money on the property in reliance on the promise constituted sufficient consideration, in equity, to require enforcement of the promise.<sup>65</sup>

### E. Real Estate Transactions

1. *Real Estate Brokers*.—In *Shrum v. Dalton*,<sup>66</sup> a property owner appealed from a decision granting a real estate broker a commission on a sale of the property owner's farm. The broker and seller had entered into an exclusive listing agreement. When a potential buyer was procured, a written offer to purchase was executed. The offer to purchase, which contained a commission clause, was contingent upon the buyer's selling two other properties. The contingency was not contained in the written

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<sup>57</sup>*Id.* at 1011.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*See, e.g.*, *Hathaway v. Roll*, 81 Ind. 567 (1882).

<sup>63</sup>RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

<sup>64</sup>158 Ind. 280, 63 N.E. 472 (1902).

<sup>65</sup>*Id.* at 286-87, 63 N.E. at 474-75.

<sup>66</sup>442 N.E.2d 366 (Ind. Ct. App. 1982).

contract and was, therefore, an oral term of the agreement. The court stated that "[a] contract partly in writing and partly in parol is a parol contract, and does not satisfy a statute requiring a written contract."<sup>67</sup> Since an oral contract for the sale of land is unenforceable,<sup>68</sup> the broker was not entitled to a commission based on procurement of such a contract.<sup>69</sup>

In *Deltona Corp. v. Weiss*,<sup>70</sup> a licensed real estate salesperson contended that recovery on an oral contract to pay a commission on the sale of real estate was enforceable because the salesperson was an employee of the seller.<sup>71</sup> The court, however, held that the oral contract to pay the commission was unenforceable<sup>72</sup> and further stated that no alternative theory could be invoked to bypass the rule.<sup>73</sup>

2. *Vendor-Vendee*.—In *Kokomo Veterans, Inc. v. Shick*,<sup>74</sup> the court addressed the issues of whether the defendant-seller had the apparent authority to enter into a land sale contract,<sup>75</sup> and whether the failure to fulfill a condition precedent of the contract precluded an action for specific performance.<sup>76</sup> The property involved, which was used to hold V.F.W. meetings, was listed for sale. Negotiations between the plaintiff Schick and trustees of the V.F.W. Post culminated in a signed counter-offer by the V.F.W. Post which was accepted and signed by Schick. After entering into the contract, the parties were informed that the property was owned by Kokomo Veterans, Inc., and not by the V.F.W. Post. Thereafter, the officers of Kokomo Veterans authorized the sale in a signed document. Later, after Schick had obtained working capital by refinancing his home and had begun work on the property, he was informed that floor approval of the sale was necessary. When floor approval was not obtained, Schick brought an action for specific performance of the sales contract.<sup>77</sup>

The defendant-seller claimed that the parties who signed the contract did not have authority to enter into a binding agreement.<sup>78</sup> The Indiana Court of Appeals, however, applied the doctrine of equitable estoppel<sup>79</sup> and affirmed the trial court's order of specific performance.<sup>80</sup> Under the

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<sup>67</sup>*Id.* at 370 (quoting *Ward v. Potts*, 228 Ind. 228, 234, 91 N.E.2d 643, 645 (1950)).

<sup>68</sup>Indiana's statute of frauds requires land sale contracts to be in writing. 442 N.E.2d at 369 (citing IND. CODE § 32-2-1-1 (1976)).

<sup>69</sup>442 N.E.2d at 370.

<sup>70</sup>441 N.E.2d 697 (Ind. Ct. App. 1982).

<sup>71</sup>*Id.* at 699.

<sup>72</sup>*Id.* (citing IND. CODE § 32-2-2-1 (1982)).

<sup>73</sup>441 N.E.2d at 699-700.

<sup>74</sup>439 N.E.2d 639 (Ind. Ct. App. 1982).

<sup>75</sup>*Id.* at 642.

<sup>76</sup>*Id.* at 643.

<sup>77</sup>*Id.* at 642.

<sup>78</sup>*Id.* at 643.

<sup>79</sup>*Id.* at 644.

<sup>80</sup>*Id.* at 646.

doctrine of equitable estoppel a principal is estopped to deny the authority of an agent whom the principal has cloaked with apparent authority when a third party has been induced to change position in reliance on the apparent authority of the agent.<sup>81</sup> The court also noted that the sale had been ratified by the corporation.<sup>82</sup> The court had little sympathy for the defendant-seller, since it was apparent to the court that the defendant was balking at the sale because of an increase in interest rates which had made the sale less favorable to the defendant.<sup>83</sup>

Another issue raised in the case was the effect on the action for specific performance of two unfulfilled conditions precedent to the contract.<sup>84</sup> The two conditions were the workability of an air conditioner and the purchaser's being able to obtain a change in use permit. The court stated that a party could not raise the nonfulfillment of a condition precedent as a bar to enforcement of a contract when it was the party's duty to procure fulfillment.<sup>85</sup> The court also noted that the party benefited by a condition precedent to a contract may waive fulfillment of that condition.<sup>86</sup>

In *Zalewski v. Simpson*,<sup>87</sup> a vendor sued purchasers for damages under a liquidated damages clause in a contract of sale when the purchasers refused to perform the contract.<sup>88</sup> The purchasers alleged that the vendor failed to provide them with a survey and title materials.<sup>89</sup> The court ruled that supplying the documents to the lender did not constitute a material breach of the contract where the documents were available to the purchasers for more than thirty days prior to closing, and where the purchasers failed to object after having been notified three days prior to the scheduled closing that the materials were in order and had been delivered to the purchasers.<sup>90</sup>

The court also upheld a liquidated damages provision in the contract which provided for damages of ten percent of the sale price plus seven percent of the price for a real estate commission.<sup>91</sup> The court noted that liquidated damages provisions are upheld when two conditions are met: (1) when the nature of the contract is such that damages are uncertain and difficult to ascertain, and (2) when the designated sum is not grossly disproportionate to the loss that might result.<sup>92</sup> The court upheld the pro-

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<sup>81</sup>*Id.* at 643.

<sup>82</sup>*Id.* at 644.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 645.

<sup>85</sup>*Id.* (citing *Billman v. Hensel*, 391 N.E.2d 671 (Ind. Ct. App. 1979)).

<sup>86</sup>439 N.E.2d at 645.

<sup>87</sup>435 N.E.2d 74 (Ind. Ct. App. 1982).

<sup>88</sup>*Id.* at 75.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* at 77.

<sup>92</sup>*Id.* (citing *General Bargain Center v. American Alarm Co.*, 430 N.E.2d 407, 411 (Ind. Ct. App. 1982)).



vision even though the "damages awarded seem[ed] rather high," and actual damages were apparently ascertainable and less than the amount of liquidated damages.<sup>93</sup>

In *South v. Colip*,<sup>94</sup> the purchase agreement contained a waiver clause stating that the "purchaser hereby releases the seller, brokers, REALTOR(S) and salespeople herein from any and all liability relating to any defect or deficiency affecting said real estate, which release shall survive the closing of the transaction."<sup>95</sup> The realtor told the purchasers that there was no need to worry about the property's condition, and made several other statements "to the effect that all the major systems and appliances were new or in good condition."<sup>96</sup> The realtor also informed the plaintiffs that they could make the "purchase contingent upon an independent professional inspection of the property."<sup>97</sup> After the purchasers took possession, they experienced several problems with the house and initiated an action for fraud, seeking \$150,000 in damages.

The court reached two conclusions. First, the plaintiffs' action for fraud failed because the element of reasonable reliance by the plaintiffs on the misrepresentations of the defendant was missing.<sup>98</sup> Second, the court held that because there was no disparity in bargaining power, and because the realtor told the plaintiffs that they could make the contract contingent on an independent professional inspection, the waiver clause was not unconscionable.<sup>99</sup>

In *Dunfee v. Waite*,<sup>100</sup> the vendor sought foreclosure of a land sales contract when the purchasers failed to make timely payment of real estate taxes.<sup>101</sup> However, on the day of trial the purchasers paid the amount owed to the county on the tax obligation and paid to the vendor the amount they thought was owed to the vendor on the tax obligation.<sup>102</sup> The court of appeals upheld the trial court's verdict that the vendor was not entitled to foreclosure.<sup>103</sup>

The court of appeals found that the vendees were entitled to the defense of tender.<sup>104</sup> Although the defense of tender requires the defendant to bring full payment to the court at trial, a good faith mistake about the amount due the vendor, where the discrepancy between the

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<sup>93</sup>435 N.E.2d at 78.

<sup>94</sup>437 N.E.2d 494 (Ind. Ct. App. 1982).

<sup>95</sup>*Id.* at 496.

<sup>96</sup>*Id.* at 495.

<sup>97</sup>*Id.* at 498.

<sup>98</sup>*Id.* at 499.

<sup>99</sup>*Id.*

<sup>100</sup>439 N.E.2d 664 (Ind. Ct. App. 1982).

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 665.

<sup>103</sup>*Id.* at 666.

<sup>104</sup>*Id.*

amount due and the amount tendered was relatively small, did not affect the validity of the defense.<sup>105</sup> Tender after the institution of suit did not, however, avoid the assessment against the defendants of the plaintiff's attorneys fees, costs, and interest.<sup>106</sup>

In *Ridenour v. France*,<sup>107</sup> the vendor sought specific performance of a land sales contract. Prior to the execution of the contract, the vendees had rented the property from the vendors. Before the closing, the house on the property to be sold was destroyed by fire. The vendees had relied on the fact that the vendors had not refunded any of the July, 1978 rent, had used certain outbuildings rent-free, and had continued to insure the property;<sup>108</sup> thus, the vendees argued that the vendor retained equitable ownership and that the landlord-tenant relationship remained.<sup>109</sup> The court rejected this argument and found that, absent an agreement to the contrary, the risk of loss passed to the purchasers as equitable owners of the property, upon the formation of the contract of sale.<sup>110</sup> Therefore, the court ordered specific performance of the land sale contract.<sup>111</sup>

#### F. Water Law

In the United States, modern law with respect to surface water<sup>112</sup> has evolved from two diametrically opposed rules: the common enemy rule

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<sup>105</sup>*Id.*

<sup>106</sup>*Id.* In *Gorbett v. Estelle*, 438 N.E.2d 766 (Ind. Ct. App. 1982), the court stated that where a vendor repeatedly accepts late payments, the vendor waives the right to terminate the contract for lateness of payment. *Id.* at 769. The court also noted that personal notice to the purchasers was required before the vendors could reinstate the term of the contract requiring that timely payments be made. *Id.*

<sup>107</sup>442 N.E.2d 716 (Ind. Ct. App. 1982).

<sup>108</sup>*Id.* at 717.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* at 718. The court did not indicate whether the vendor recovered under the insurance policy. The court needed to address the issues of whether the insurance company should have been obligated to pay and whether the vendee should have been given an abatement. *Cf. Indiana Ins. Co. v. Sentry Ins. Co.*, 437 N.E.2d 1381 (Ind. Ct. App. 1982) stating that:

Although it is true that in an action between the vendee and the vendor the vendee would usually bear the risk of loss, this legal principle is irrelevant in the instant case. To hold otherwise would state that when the vendee bears the risk of loss (which is usually the case), the insurer of the vendor's interest would never pay for a loss even though it accepted the premiums from the vendor; the vendee would then become the insurer and the insurance company would be relieved of its role as insurer and allowed to reap the windfall of the premiums it collected from the vendor.

*Id.* at 1388 (footnote omitted).

<sup>112</sup>Indiana defines surface water as "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has

and the civil law rule.<sup>113</sup> Under the common enemy rule, surface water is treated as a common enemy with which every landowner may deal as he sees fit regardless of the consequences to any other property owners. Under the civil law rule, a landowner is precluded from altering or interfering with the natural flow of surface water. Both rules are based upon real property concepts and, in their purest form, both can lead to harsh results.<sup>114</sup> Due to this harshness, these rules have been modified in all jurisdictions in the United States.<sup>115</sup> While many states retain the common enemy rule or civil law rule with only minor modifications, a substantial number of states have adopted what has come to be known as the reasonable use rule,<sup>116</sup> which is based on tort concepts rather than property concepts.<sup>117</sup> The reasonable use rule allows each landowner "to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage."<sup>118</sup> Indiana initially adopted the common enemy doctrine<sup>119</sup> and has traditionally followed this rule with minor modifications.<sup>120</sup>

In December, 1981, the third district court of appeals adopted the reasonable use rule regarding surface water in *Rounds v. Hoelscher*.<sup>121</sup> The court in *Rounds* held that a landowner may not use his property so as to cause unnecessary injury to others.<sup>122</sup> Judge Hoffman, although concurring in the result, criticized the majority for not following the rule of precedent.<sup>123</sup> He noted that the reasonable use rule lacked predictability

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no definite banks or channel." *Capes v. Barger*, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) (citing *Taylor v. Fickas*, 64 Ind. 167 (1878); *Ramsey v. Ketcham*, 73 Ind. App. 200, 127 N.E. 204 (1920)).

<sup>113</sup>For a general discussion of surface water law, see 78 AM. JUR. 2D *Waters* §§ 119-22 (1975).

<sup>114</sup>Both rules have been the subjects of sharp criticism. See Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72 (1968).

<sup>115</sup>*Argyelan v. Haviland*, 435 N.E.2d 973, 975 (Ind. 1982).

<sup>116</sup>The reasonable use rule apparently was first adopted in *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862). See Annot., 59 A.L.R.2d 421, 435 (1958).

<sup>117</sup>See RESTATEMENT (SECOND) OF TORTS § 833 (1979).

<sup>118</sup>*Pendergrast v. Aiken*, 293 N.C. 201, 219, 236 S.E.2d 787, 796 (1977).

<sup>119</sup>See *Taylor v. Fickas*, 64 Ind. 167 (1878); 29 I.L.E. *Waters* § 52 (1960).

<sup>120</sup>See *Conner v. Woodfill*, 126 Ind. 85, 25 N.E. 876 (1890) (landowners may not shed the water from their building so as to throw it upon lands of others); *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N.E. 449 (1889) (landowner may not collect the water in a volume and cast it upon land of another); *Templeton v. Voshloe*, 72 Ind. 134 (1880) (water may not be conducted by new channels in unusual quantities onto particular parts of the lower field).

<sup>121</sup>428 N.E.2d 1308 (Ind. Ct. App. 1981).

<sup>122</sup>*Id.* at 1315.

<sup>123</sup>*Id.* at 1316-18 (Hoffman, J., concurring).

and would prevent lawyers from being able to advise their clients with any degree of certainty.<sup>124</sup>

In April, 1981, the second district court of appeals had applied the common enemy rule to a surface water dispute in *Argyelan v. Haviland*.<sup>125</sup> The Indiana Supreme Court granted a petition to transfer in *Argyelan* to settle the split between the circuits and to clarify Indiana law.<sup>126</sup> In *Argyelan*, the defendants had acquired a tree and grass covered parcel adjacent to the plaintiffs' residential lot.<sup>127</sup> The defendants, after having their lot rezoned commercial, removed all the grass and trees, raised the level of the lot two to three feet, constructed two buildings and paved most of the remaining ground surface. As a result of these improvements, water from defendants' parcel drained into plaintiffs' lot. After a moderate rain, water accumulated three to four inches deep around the plaintiffs' garage and utility shed, and covered their garden and part of their driveway.

After postulating that Indiana would not allow a malicious or wanton exercise of drainage rights under the common enemy doctrine,<sup>128</sup> the supreme court found that in Indiana the only judicially recognized limitation on those rights "is that one may not collect or concentrate surface water and cast it, in a body, upon his neighbor."<sup>129</sup> Specifically overruling the *Rounds* decision, the court held that, except as modified by the cases prohibiting an artificial casting of surface water on a neighbor in unusual quantities,<sup>130</sup> the Indiana law regarding surface water remained as stated in *Taylor v. Fickas*:<sup>131</sup>

"The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of [an] adjoining owner that an alteration in the mode of its improvement or

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<sup>124</sup>*Id.* at 1318.

<sup>125</sup>418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982).

<sup>126</sup>435 N.E.2d 973 (Ind. 1982).

<sup>127</sup>The facts are taken from the dissenting opinion. *Id.* at 979-81 (Hunter, J., dissenting).

<sup>128</sup>The court defined the common enemy rule as follows:

[S]urface water which does not flow in defined channels is a common enemy and . . . each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

435 N.E.2d at 975.

<sup>129</sup>*Id.* at 976 (citing *Cloverleaf Farms, Inc. v. Surratt*, 169 Ind. App. 554, 349 N.E.2d 731 (1976); *Gene B. Glick Co. v. Marion Constr. Corp.*, 165 Ind. App. 72, 331 N.E.2d 26 (1975)).

<sup>130</sup>*See* case cited *supra* note 120.

<sup>131</sup>64 Ind. 167 (1878).

occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow."<sup>132</sup>

In rejecting the reasonable use rule the court stated that while "courts should not be slow to respond to changing conditions, changes in the established law are not warranted simply because it is imperfect."<sup>133</sup> The court added that the examples of other states need not be followed until it is shown that theirs is the better way.<sup>134</sup> The court saw no need to adopt a rule which would remove the advantage from the owner of the highest ground and which, due to its lack of predictability, would make drainage commissions of already overburdened courts.<sup>135</sup>

In a well-reasoned dissenting opinion,<sup>136</sup> Justice Hunter, joined by Chief Justice Givan, criticized the majority for rejecting the reasonable use rule without examining the reasons for adopting it or addressing the strengths and weaknesses of the different positions.<sup>137</sup> Justice Hunter noted that modern technology, which can radically alter existing drainage patterns and natural surfaces, can produce surface water disputes for which the common enemy rule is inadequate.<sup>138</sup> In addition, Justice Hunter would have found this case indistinguishable from *Conner v. Woodfill*,<sup>139</sup> and thus within Indiana's modified common enemy doctrine.<sup>140</sup> In his view, the majority decision presented Indiana "with a rule of law and result so inimical to any sense of justice, be it lay or legal, that it offends our system of jurisprudence."<sup>141</sup>

The result in *Argyelan* not only establishes the common enemy doctrine as the law in Indiana regarding surface waters, but also suggests that any modifications to the doctrine are to be strictly construed. The strict construction of the modifications was shown in *Kramer v. Rager*.<sup>142</sup> In *Kramer*, the court of appeals found that the defendant's use of a drainpipe to divert water to a culvert, through which it passed onto a neighbor's

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<sup>132</sup>435 N.E.2d at 976-77 (quoting *Taylor*, 64 Ind. at 173).

<sup>133</sup>435 N.E.2d at 977.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>*Id.* at 978 (Hunter, J., dissenting).

<sup>137</sup>*Id.* at 984.

<sup>138</sup>*Id.* at 987.

<sup>139</sup>126 Ind. 85, 25 N.E. 876 (1890). The majority distinguished *Conner* based on the nature of the flow of water entering the neighbor's property. 435 N.E.2d at 976.

<sup>140</sup>435 N.E.2d at 983 (Hunter, J., dissenting).

<sup>141</sup>*Id.* at 978.

<sup>142</sup>441 N.E.2d 700 (Ind. Ct. App. 1982).

land, was analogous to the use of downspouts in *Argyelan* and valid under the common enemy rule.<sup>143</sup>

### G. Landlord and Tenant

The traditional legal maxim caveat emptor is slowly being replaced, making vendors and landlords responsible for the real estate they transfer under the theory of implied warranty of habitability. Since the late 1960's, many jurisdictions have adopted this theory either by legislative enactment or by judicial decision.<sup>144</sup>

The Indiana Court of Appeals has recognized an implied warranty of habitability although the boundaries of the doctrine remain largely undefined.<sup>145</sup> The first Indiana decision to declare an implied warranty of habitability in residential leases was *Old Town Development Co v. Langford*.<sup>146</sup> The implied warranty of habitability for residential leases has been defined as having two parts: (1) a warranty that the leasehold at the time of transfer is free from latent defects rendering the premises unsuitable for residential habitation; and (2) a promise that the leasehold will remain suitable for residential habitation for the entire term, which includes an implied duty to repair.<sup>147</sup>

The implied warranty of habitability was recognized again in *Breezewood Management Co. v. Maltbie*.<sup>148</sup> In *Breezewood*, the plaintiff-landlord sued for rent due and the tenants counterclaimed for damages and rent abatement. A city inspection of the property revealed over fifty housing code violations, including eleven "life-safety" violations.<sup>149</sup> By law, the violated provisions of the city housing code had been incorporated into the lease because the code was in effect when the lease was executed.<sup>150</sup> The court concluded that the landlord had breached the implied warranty of habitability.<sup>151</sup> However, the court severely limited its holding by stating that it was within the parties' rights to rent or lease according to their reasonable expectations, and that where the parties enter into a lease not

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<sup>143</sup>*Id.* at 706.

<sup>144</sup>For a list of statutes and decisions of forty states and the District of Columbia recognizing an implied warranty of habitability in residential leases, see *Pugh v. Holmes*, 486 Pa. 272, 281 n.2, 405 A.2d 897, 901 n.2 (1979).

<sup>145</sup>See Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 641-43 (1977).

<sup>146</sup>349 N.E.2d 744 (Ind. Ct. App. 1976), *cause dismissed*, 267 Ind. 176, 369 N.E.2d 404 (1977). The effect of this case was erased when the Indiana Supreme Court granted a petition to transfer but then dismissed without decision when the parties reached a settlement. See IND. R. APP. P. 11(b)(3).

<sup>147</sup>349 N.E.2d at 774.

<sup>148</sup>411 N.E.2d 670 (Ind. Ct. App. 1980).

<sup>149</sup>*Id.* at 671.

<sup>150</sup>*Id.* at 675.

<sup>151</sup>*Id.*

in violation of local housing codes and the premises are what they appear, no action for breach of implied warranty of habitability will lie.<sup>152</sup>

During the survey period, the same Indiana Court of Appeals that handed down the *Breezewood* decision refused to extend an implied warranty of habitability to the facts in *Zimmerman v. Moore*.<sup>153</sup> In *Zimmerman*, a tenant suffered injuries in a fall while attempting to climb the steps at the rear of her single-family residence. The tenant brought suit against the landlord on theories of negligence, breach of a covenant to repair, and breach of implied warranty of habitability.<sup>154</sup> After examining the history of implied warranties of habitability in Indiana regarding both leases and sales, the court of appeals reversed the trial court's award of damages and declined "to extend an implied warranty of habitability to the rental of a single-family, used dwelling."<sup>155</sup> The court noted that the cases cited by the plaintiff, which found implied warranties of habitability, dealt with large city apartment projects managed by professionals.<sup>156</sup> The justifications for those cases, the court explained, were that landlords have greater knowledge or expertise and are better able to absorb and spread the loss.<sup>157</sup> The court found neither justification applicable in *Zimmerman* which involved "a non-merchant lessor who casually rents a single-family dwelling."<sup>158</sup>

While the doctrine of implied warranty of habitability has been adopted by judicial decision, its exact boundaries are yet to be determined. Limited by the facts of the cases it reviews, the judiciary is not the best place to make the fine lines defining the limits of the doctrine. Instead the legislature should participate in the law making on this issue and enact a statute regarding this doctrine.

In *Crowell v. Septer*,<sup>159</sup> the landlord brought an action for eviction and the tenant counterclaimed for damages sustained from a fall on a wet floor caused by a roof leak. The tenant's action was based upon the landlord's breach of a promise to repair the roof.<sup>160</sup> The court of appeals stated that, even when a landlord has contracted to make repairs, where the cost of repair is minimal the tenant must mitigate his damages by making the repairs and deducting the cost from the rent.<sup>161</sup> The exception

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<sup>152</sup>*Id.* at 675 n.2. It would appear that housing codes may provide the current standard for implied warranty of habitability.

<sup>153</sup>441 N.E.2d 690 (Ind. Ct. App. 1982).

<sup>154</sup>*Id.* at 692.

<sup>155</sup>*Id.* at 696.

<sup>156</sup>*Id.* at 695.

<sup>157</sup>*Id.* at 695-96.

<sup>158</sup>*Id.* at 696. The court compared this case to *Vetor v. Shockey*, 414 N.E.2d 575 (Ind. Ct. App. 1980), where the court rejected the extension of the doctrine of implied warranty of habitability to the sale of used housing by non-builder vendors.

<sup>159</sup>433 N.E.2d 803 (Ind. Ct. App. 1982).

<sup>160</sup>*Id.*

<sup>161</sup>*Id.* at 804-05.

to this rule is that the tenant may recover if the landlord, after covenanting to make repairs and receiving notice, has repeatedly promised to repair and the tenant in good faith has relied on the landlord's promises.<sup>162</sup>

### H. Eminent Domain

The traditional formula for determining damages for a leasehold interest in land taken under eminent domain is the fair market rental value of the property for the remaining term of the lease less the amount of rent contracted to be paid.<sup>163</sup> However, in appropriate circumstances valuation of the leasehold interest may be determined by a capitalization of income method.<sup>164</sup> Under this method of valuation, an independent value is given to the land, then the value of the improvements, arrived at by capitalizing actual or reasonable income at a reasonable rate of return, are added to this value.<sup>165</sup> In *J.J. Newberry Co. v. City of East Chicago*,<sup>166</sup> the court of appeals recognized the capitalization of income method for determining leasehold value but upheld the trial court's valuation using the fair market value.<sup>167</sup>

*J.J. Newberry Co.* held a twenty-five year lease for a certain piece of real estate and the improvements thereon. Newberry operated a variety store on the premises until a fire completely destroyed the building. The land remained unimproved during years of litigation between Newberry and the lessors,<sup>168</sup> and eventually, in an effort to clean up blighted areas, the City of East Chicago condemned the property. A trial was held to determine the amounts to be awarded to the parties. The court concluded that the lessors were entitled to \$44,240, while Newberry was entitled to \$760. The trial court determined the value of Newberry's leasehold interest by the fair market value method. Newberry appealed, arguing that the court should have used the income capitalization method.<sup>169</sup>

While the court of appeals recognized that the capitalization method might be appropriate in certain circumstances, it agreed with the trial court that the capitalization method was not applicable here, where the building Newberry used to produce income had been completely destroyed.<sup>170</sup> Newberry also argued that the trial court misapplied Indiana law when

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<sup>162</sup>*Id.* at 805.

<sup>163</sup>*J.J. Newberry Co. v. City of East Chicago*, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing *State v. Heslar*, 257 Ind. 307, 274 N.E.2d 261 (1971)).

<sup>164</sup>*J.J. Newberry Co. v. City of East Chicago*, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing *State v. Nelson*, 156 Ind. App. 399, 296 N.E.2d 908 (1973)).

<sup>165</sup>*J.J. Newberry Co. v. City of East Chicago*, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing 4 SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.32(3)(c) (3d rev. ed. 1981)).

<sup>166</sup>441 N.E.2d 39 (Ind. Ct. App. 1982).

<sup>167</sup>*Id.* at 42.

<sup>168</sup>*Id.* at 41.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 42.



it concluded that the sum of the interests of the lessors and Newberry could not exceed the value of the premises as a whole. The court of appeals found the issue resolved by the Indiana Supreme Court in *State v. Montgomery Circuit Court*,<sup>171</sup> which stated that “[f]or the purposes of condemnation proceedings, the value of all the interests or estates in a single parcel of land cannot exceed the value of the property as a whole.”<sup>172</sup> While Newberry classified the passage in *Montgomery* as dicta, the court of appeals refused to deviate from this rule, known as the “undivided fee rule,” without action by the Indiana Supreme Court.<sup>173</sup>

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<sup>171</sup>239 Ind. 337, 157 N.E.2d 577 (1959).

<sup>172</sup>*Id.* at 340 n.1, 157 N.E.2d at 578 n.1, *quoted in J.J. Newberry Co.*, 441 N.E.2d at 43.

<sup>173</sup>441 N.E.2d at 43.

### XIII. Taxation

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#### A. Introduction

Several interesting developments in the area of state taxation occurred during the survey period. The most important cases and statutes will be discussed within the following sections of this Survey Article: unitary business tax, property tax exemption, gross income tax, intangibles tax, sales tax exemption, and real estate reassessment procedures. The final section of this survey discusses cases decided by United States District Courts for the Northern and Southern Districts of Indiana and cases decided by the Court of Appeals for the Seventh Circuit<sup>1</sup> concerning federal income and estate taxation. The survey of federal tax cases is intended to cover only cases that are of interest to attorneys engaged in general practice in Indiana.

#### B. The Unitary Business Tax Concept

The unitary business tax concept has continued to be the tumultuous issue of state taxation. A cycle of conflicting judicial precedents, starting with the United States Supreme Court's decision in *Mobil Oil Corp. v. Commissioner of Taxes*,<sup>2</sup> followed by the Court's decision in *ASARCO, Inc. v. Idaho State Tax Commission*<sup>3</sup> and *F.W. Woolworth Co. v. Taxation & Revenue Department*,<sup>4</sup> and concluding with the Supreme Court's decision in *Container Corp. of America v. Franchise Tax Board*,<sup>5</sup> illustrates that the unitary business concept has in recent years received more acrimonious attention by taxpayers and state revenue departments than any other facet of state or federal taxation. This bitter controversy involves the basic question of how far the states may reach out to tax the combined or unitary income of a multistate or multinational business as

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<sup>1</sup>It should be noted that although some of the cases decided by the Seventh Circuit Court of Appeals did not involve Indiana taxpayers, those cases are precedent not only in the federal district courts in Indiana, but also in the United States Tax Court. See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

<sup>2</sup>445 U.S. 425 (1980).

<sup>3</sup>458 U.S. 307 (1982).

<sup>4</sup>458 U.S. 354 (1982).

<sup>5</sup>103 S. Ct. 2933 (1983).

conducted by affiliated subsidiaries or divisions located throughout the United States or the world.

Although Indiana has not yet taken an aggressive stance as to how this state might apply the unitary business concept, pressure is mounting for the state to decide the issue from taxpayers supporting and opposing the concept. Indiana taxpayers, in their future tax-planning endeavors, should therefore be alert to an inevitable determination by the state as to how it will administer the unitary business tax concept. Because an in-depth examination of *Container* and the other recent United States Supreme Court decisions concerning the unitary business concept really warrants a separate article,<sup>6</sup> only one specific observation as to the status of this issue is appropriate in this Survey Article.

In *Container*, the Supreme Court, departing from its practice in both *ASARCO* and *Woolworth*, emphasized that it will not reweigh the findings of fact of the state trial court in determining whether the imposition of a particular state tax burdens interstate commerce or transgresses upon due process protection. Tax litigators are advised once again that "state tax cases are to be litigated with the same care and evidentiary concerns as any product liability, personal injury, or breach of contract case."<sup>7</sup> Perhaps with an eye toward reducing the number of state tax appeals, the Supreme Court plainly reinstated the principle of appellate review in *Container* which our Indiana Supreme Court and Court of Appeals have long espoused. Namely, that in reviewing trial court state tax decisions, the appellate court will not reweigh the evidence and will accept the trial court's findings of facts if supported by substantial evidence. Thus, Indiana state tax cases, even those on appeal to the United States Supreme Court, can be won or lost at the trial court level.

### C. Property Tax Exemption: Goods Held for Interstate Shipment

The major decision during the survey period in the field of property taxation was *Indiana State Board of Tax Commissioners v. Stanadyne, Inc.*<sup>8</sup> In *Stanadyne*, the Indiana Court of Appeals considered an appeal from a trial court's grant of a personal property tax exemption for inventory held for interstate shipment by a taxpayer in its distribution warehouse. The trial court's grant of an exemption was based both on

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<sup>6</sup>There are many fine publications which discuss this topic. See, e.g., P. HARTMAN, *FEDERAL LIMITATIONS IN STATE AND LOCAL TAXATION* ch. 9 (1981 & Supp. 1983); J. HELLERSTEIN, *STATE TAXATION* § 8.11(4) (1983); Hellerstein, *State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on ASARCO and Woolworth*, 81 MICH. L. REV. 157 (1982); Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After Container Corporation of America v. Franchise Tax Board*, 16 IND. L. REV. 783 (1983).

<sup>7</sup>King, *Taxation, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 523, 523 (1981).

<sup>8</sup>435 N.E.2d 278 (Ind. Ct. App. 1982).

the relevant statutory provision<sup>9</sup> and on the commerce clause of the United States Constitution.<sup>10</sup>

It appears from the court's opinion that the taxpayer based its statutory exemption claim under both Indiana Code section 6-1.1-10-30(a) and (b).<sup>11</sup> The Tax Board contended that neither the "original package" nor the "original bill of lading" requirements of the two provisions were satisfied and that the repackaging which took place at the warehouse was illustrative of a break in transit which caused the commerce clause to be inapplicable.<sup>12</sup>

The stipulated facts indicated that at the taxpayer's out-of-state plant individual items (faucets and other fixtures) were sealed in separate packages, with groups of identical items then being packed in large boxes. These large boxes were then placed on pallets for transportation to the taxpayer's Indiana warehouse by its private trucking division. After arriving at the warehouse, the boxes containing identical packaged items were, on occasion, rearranged on separate pallets with boxes containing different packaged items to meet specific customer orders. The boxes, however, were rarely opened.<sup>13</sup>

The court found that most of the products remained in their original package.<sup>14</sup> This finding was obviously premised on the court's conclusion that the unopened boxes, which contained the separately packaged individual items, constituted the original package rather than the small internal packages, which held the individual fixtures, or the pallets, which held the aggregated boxes.

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<sup>9</sup>IND. CODE § 6-1.1-10-30 (1976) (amended 1981).

<sup>10</sup>U.S. CONST. art. 1, § 8, cl. 3.

<sup>11</sup>IND. CODE § 6-1.1-10-30 (1976) reads in pertinent part:

(a) Subject to the limitations contained in subsection (c) of this section, personal property is exempt from taxation if:

(1) The property is owned by a nonresident of this state;

(2) The property has been shipped into this state and placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state or a within-the-state destination as evidenced by the original bill of lading; and

(3) The property remains in the original package and in the public or private warehouse.

(b) Subject to the limitation contained in subsection (c) of this section, personal property is exempt from property taxation if:

(1) The property has been placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination as evidenced by the original bill of lading; and

(2) The property remains in the original package and in the public or private warehouse.

*Id.* (amended 1981).

<sup>12</sup>435 N.E.2d at 280, 282.

<sup>13</sup>*Id.* at 280.

<sup>14</sup>*Id.*

The court held that the bill of lading requirement of Indiana Code section 6-1.1-10-30 was satisfied, even though the shipping document used by the taxpayer showed the Indiana warehouse as the destination of the goods from the factory, rather than the address of the ultimate purchaser.<sup>15</sup> In so holding, the court relied on the Indiana Supreme Court decision in *State Board of Tax Commissioners v. Carrier Corp.*<sup>16</sup> The bill of lading in *Carrier*, unlike that in *Stanadyne*, contained a statement that the goods were placed in the warehouse for purposes of transshipment to an out-of-state destination;<sup>17</sup> therefore, *Carrier* was entitled to the tax exemption. Broadening the scope of the statute, the *Stanadyne* court found that because the *Stanadyne* warehouse was a distribution warehouse with no retailing activities, the taxpayer intended to ship the goods to another destination from the warehouse. The court thus concluded that the taxpayer's shipping documents were sufficient to meet the original bill of lading requirement under the statute.<sup>18</sup>

The exemptions allowed by Indiana Code section 6-1.1-10-30(a) and (b) were subject to subsection (c) which provided that the exemptions applied "only to the extent that the property is exempt from taxation under the commerce clause of the Constitution of the United States."<sup>19</sup> The Tax Board argued that no commerce clause exemption existed because (1) the goods were transported by a private carrier, (2) the goods were held in a private warehouse, (3) transshipment language was absent from the bill of lading, and (4) certain of the goods were rearranged to satisfy specific customer orders at the warehouse.<sup>20</sup> The court found that none of these factors indicated a legal break in interstate commerce, but rather merely reflected modern interstate marketing methods, all within the flow of such commerce. Thus, the court found the exemptions applicable both under the Indiana statute and the commerce clause of the United States Constitution.

Although Indiana Code section 6-1.1-10-30 has since been amended,<sup>21</sup> subsection (a), applicable to property owned by a nonresident, still contains both the "original package" and "original bill of lading"

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<sup>15</sup>*Id.* at 281.

<sup>16</sup>266 Ind. 615, 365 N.E.2d 1385 (1977).

<sup>17</sup>*Id.* at 617, 365 N.E.2d at 1386.

<sup>18</sup>435 N.E.2d at 281.

<sup>19</sup>IND. CODE § 6-1.1-10-30(c) (1976) (amended 1981).

<sup>20</sup>435 N.E.2d at 282.

<sup>21</sup>IND. CODE § 6-1.1-10-30 (1982) currently provides:

Sec. 30. (a) Subject to the limitations contained in subsection (d) of this section, personal property is exempt from taxation if:

- (1) The property is owned by a nonresident of this state;
- (2) the property has been shipped into this state and placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state or a within-the-state destination as evidenced by the original bill of lading; and

requirements.<sup>22</sup> However, the original bill of lading requirement has been replaced in subsection (b) with a requirement that the specific destination of the goods be known on the assessment date.<sup>23</sup> Thus, under the current statutory formula, a taxpayer in *Stanadyne's* position would most likely still qualify for exemption under subsection (a), but not under subsection (b). Therefore, the *Stanadyne* decision will continue to have relevance as long as subsection (a) remains unchanged and Indiana continues to be attractive to business as a major distribution center.

#### *D. Gross Income Taxation: Interstate Commerce Exception*

In *Indiana Department of State Revenue v. Brown Boveri Corp.*,<sup>24</sup> the Indiana Supreme Court adopted the part of the court of appeals' deci-

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(3) the property remains in the original package and in the public or private warehouse.

For purposes of this subsection, a nonresident is a taxpayer who places goods in the original package and into the stream of commerce from outside of the state of Indiana.

(b) Subject to the limitation contained in subsection (d) of this section, personal property is exempt from property taxation if:

- (1) the property has been placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination;
- (2) the property remains in the original package and in the public or private warehouse; and
- (3) the property had been ordered and is ready for shipment in interstate commerce to a specific known destination to which the property is subsequently shipped.

If a property tax exemption is claimed under this subsection for property which is not shipped to the specific known destination required under clause (3), the taxpayer shall file an amended personal property tax return for the year for which the exemption for that property was claimed.

(c) Subject to the limitation contained in subsection (d) of this section, personal property is exempt from property taxation if:

- (1) the property has been placed in the original package in a public warehouse;
- (2) the property was transported to the public warehouse by a common, contract, or private carrier;
- (3) the owner is able to show by adequate records that the property is held in the public warehouse for purposes of transshipment to an out-of-state destination and is labeled to show that purpose; and
- (4) the property remains in the original package and in the public warehouse.

However, no personal property is exempt from property taxation under this subsection if the property is owned by the same person who owns or leases the public warehouse where the property is held.

(d) An exemption provided by this section applies only to the extent that the property is exempt from taxation under the commerce clause of the Constitution of the United States.

<sup>22</sup>*Id.* § 6-1.1-10-30(a).

<sup>23</sup>*Id.* § 6-1.1-10-30(b).

<sup>24</sup>439 N.E.2d 561 (Ind. 1982), *adopting in part* 429 N.E.2d 285 (Ind. Ct. App. 1981). For a discussion of the court of appeals decision in *Brown Boveri*, see Boyd, *Taxation*,

sion recognizing that Brown Boveri's sale and installation in Indiana of an induction melting system<sup>25</sup> constituted a sale of tangible personal property in interstate commerce and was exempt from the Indiana gross income tax.<sup>26</sup> The supreme court's decision on the interstate commerce issue was a judicial direction to the Indiana Revenue Department that transactions in interstate commerce are to be considered exempt from gross income tax if the taxpayer's "activities in Indiana are so intrinsically related to and inherently a part of the interstate sale that it is seen as one continuing transaction." <sup>27</sup> In *Brown Boveri*, the taxpayer's activities in Indiana which related to the interstate sale included: (1) the removal of existing obsolete equipment at the factory site where the induction melting system was being installed, (2) pouring of foundations, trenching work, and reinforcement of existing structures, and (3) installation, testing, and adjustment of the melting system at the job site.<sup>28</sup> The court thus recognized that the interstate sale of machinery and equipment which is installed or assembled in Indiana by the seller and the performance of various local construction or erection functions by the seller will not taint the "interstate" character of the sale so long as such "activities are so intrinsically related to and inherently a part of the interstate sale" as to be considered "one continuing transaction." <sup>29</sup> The court of appeals, and in turn the supreme court, emphatically relied on *Gross Income Tax Division v. Surface Combustion Corp.*,<sup>30</sup> as "[t]he leading case for determining what activity constitutes interstate commerce."<sup>31</sup>

In past years, the Indiana Revenue Department has sought to constrain the holding of the supreme court in *Surface Combustion* to the express facts of the case.<sup>32</sup> After the *Brown Boveri* decision, similarly situated taxpayers may properly claim a gross income tax exemption under the interstate commerce limitation. Therefore, taxpayers selling machinery and equipment in interstate commerce and installing that machinery and

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1982 *Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 355, 359-60 (1983).

<sup>25</sup>The induction melting system consisted of six furnaces, four preheating and after-burning systems, and two air pollution control systems. The equipment had been manufactured at and shipped from out-of-state plants. 439 N.E.2d at 562.

<sup>26</sup>*Id.* at 564.

<sup>27</sup>*Id.* (quoting Indiana Dep't of State Revenue v. Brown Boveri Corp., 429 N.E.2d 285, 288 (Ind. Ct. App. 1981) (citing Gross Income Tax Division v. Surface Combustion Corp., 232 Ind. 100, 111 N.E.2d 750 (1953))).

<sup>28</sup>439 N.E.2d at 562-64.

<sup>29</sup>*Id.* at 564 (quoting Indiana Dep't of State Revenue v. Brown Boveri Corp., 429 N.E.2d 285, 288 (Ind. Ct. App. 1981)).

<sup>30</sup>232 Ind. 100, 111 N.E.2d 50 (1953).

<sup>31</sup>Indiana Dep't of Revenue v. Brown Boveri Corp., 429 N.E.2d 285, 287 (Ind. Ct. App. 1981), quoted in *Brown Boveri*, 439 N.E.2d at 563.

<sup>32</sup>See, e.g., Reynolds Metals Co. v. Indiana Dep't of State Revenue, 433 N.E.2d 1 (Ind. Ct. App. 1982).

equipment in Indiana should carefully compare the facts of their particular transactions to the facts of both *Brown Boveri* and *Surface Combustion* to determine whether those decisions allow an appropriate claim of exemption.

### *E. Intangibles Tax*

In *Indiana State Department of Revenue v. Valley Financial Services*,<sup>33</sup> the court addressed the issue of whether Valley Financial (taxpayer), by entering into a loan participation agreement with Valley Bank (Bank), purchased an interest in the loan or simply lent money to the Bank. Pursuant to the participation agreement, the Bank (1) was the creditor and its customer was the debtor, (2) processed the loan application, (3) controlled to whom the loan was made and the loan amount, (4) disbursed the loan money, (5) collected loan payments and remitted the appropriate portion to Valley Financial, and (6) serviced the loan.<sup>34</sup>

Declining to accept the trial court's findings that the transactions between Valley Financial and the Bank constituted loans and that no agency relationship existed, the court of appeals found that Valley Financial purchased an interest in the loan between the Bank and the customer by entering into the participation agreement.<sup>35</sup> The court of appeals held that, to the extent of the purchase of such interest, the Bank was essentially acting as Valley Financial's agent in collecting the loan payments and in remitting to Valley Financial its share of the payments.<sup>36</sup> Therefore, the court concluded that Valley Financial acquired a taxable intangible under the participation agreement.

The court rejected the taxpayer's argument that, because the taxpayer and the Bank were affiliated corporations, the transaction between Valley Financial and the Bank, if deemed to be an intangible, would be exempt under Indiana Code section 6-5.1-5-2.<sup>37</sup> This statutory provision exempts from the intangibles tax intercompany intangibles between corporations where one corporation controls eighty percent or more of the voting stock of the other.<sup>38</sup> Valley Financial argued that the transaction was a loan to the Bank and, as such, constituted an intercompany intangible exempt under section 6-5.1-5-2.<sup>39</sup> The court held that, under the participation agreement, Financial owned an undivided interest in the original loan from

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<sup>33</sup>435 N.E.2d 68 (Ind. Ct. App. 1982).

<sup>34</sup>*Id.* at 70-72.

<sup>35</sup>*Id.* at 72.

<sup>36</sup>*Id.* While the Revenue Department has promulgated rules in the gross income tax area as to the establishment of an agency relationship, 45 IND. ADMIN. CODE § 1-1-54 (1979), no such regulations exist in the intangibles tax area.

<sup>37</sup>*Id.* at 73.

<sup>38</sup>IND. CODE § 6-5.1-5-2 (1982).

<sup>39</sup>435 N.E.2d at 73.



the Bank to its customer.<sup>40</sup> Consequently, since no intercompany intangible existed, the exemption<sup>41</sup> was not applicable.

### F. Sales Tax Exemption

The sales tax exemption<sup>42</sup> of food for human consumption was construed in *Beasley v. Kwatnez*.<sup>43</sup> The Revenue Department challenged the taxpayer's claim that its sale of snack foods, such as potato chips, cookies, and prepared meats, was exempt from sales taxation under Indiana Code section 6-2.5-5-20(a).<sup>44</sup> The taxpayer sold the snack foods using cardboard display containers placed in over 4000 offices and business locations in Indiana. The sales were procured through a self-service honor system in which customers would simply choose one of the displayed items, manually remove the item, and deposit the proper amount of change in a deposit box which was part of the display container.<sup>45</sup>

Initially, the court observed that exemption statutes are strictly construed in favor of taxation and against exemption,<sup>46</sup> and that the taxpayer has the burden of showing that he complied with the strict letter of the exemption statute.<sup>47</sup> Notwithstanding its recognition of these general principles, the court declined to eviscerate the food exemption simply because the taxpayer's method of selling food was unusual. Thus, while the food exemption is subject to express statutory exceptions,<sup>48</sup> the court construed the pertinent exceptions narrowly.

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<sup>40</sup>*Id.*

<sup>41</sup>IND. CODE § 6-5.1-5-2 (1982).

<sup>42</sup>*Id.* § 6-2.5-5-20.

<sup>43</sup>445 N.E.2d 1028 (Ind. Ct. App. 1983).

<sup>44</sup>IND. CODE § 6-2.5-5-20(a) (1982).

<sup>45</sup>445 N.E.2d at 1029.

<sup>46</sup>*See* State Dep't of Revenue v. Bethel Sanitarium, Inc., 165 Ind. App. 421, 424, 332 N.E.2d 808, 811 (1975); *see also* State Dep't of Revenue v. Estate of Powell, 165 Ind. App. 482, 333 N.E.2d 92 (1975) (ambiguities in exemption statutes construed against party claiming exemption); *cf.* Gross Income Tax Div. v. L.S. Ayres & Co., 233 Ind. 194, 118 N.E.2d 480 (1954) (general rule that tax laws are construed against the state).

<sup>47</sup>*See* City of Anderson v. State Dep't of Revenue, 406 N.E.2d 346, 350 (Ind. Ct. App. 1980).

<sup>48</sup>IND. CODE § 6-2.5-5-20(c) (1982) provides:

(c) For purposes of this section, the term "food for human consumption" does not include:

- (1) candy, confectionery, and chewing gum;
- (2) alcoholic beverages;
- (3) cocktail mixes;
- (4) soft drinks, sodas, and other similar beverages;
- (5) medicines, tonics, vitamins, and other dietary supplements;
- (6) water, mineral water, carbonated water and ice;
- (7) pet food;
- (8) food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant;
- (9) meals served by a retail merchant off his premises;

The Revenue Department argued that the sales were taxable as confectionery,<sup>49</sup> an exception to the food for human consumption exemption. The court disagreed,<sup>50</sup> based upon a narrow definition of confectionery promulgated by the Department itself.<sup>51</sup>

The Revenue Department also contended that the taxpayer, by placing his cardboard display containers in various business locations, was actually conducting a portion of his business at such locations. The food exemption does not cover the sale of food served “for immediate consumption on or near the merchant’s premises”<sup>52</sup> or “for consumption at a location . . . provided by the retail merchant.”<sup>53</sup> The court of appeals found these exceptions clearly inapplicable to the taxpayer’s business enterprise. Because the taxpayer placed his cardboard display containers in several thousand business premises, he could not be considered “the provider of the business premises where the sales occurred.”<sup>54</sup> Therefore, the taxpayer’s sales were *not* made “for immediate consumption on or near the merchant’s premises”<sup>55</sup> or “for consumption at a location . . . provided by the retail merchant.”<sup>56</sup>

Finally, the Revenue Department argued that the cardboard display containers used by the taxpayer could be characterized as “vending machines.” Sales from a vending machine are statutorily excluded from the food exemption.<sup>57</sup> While the Revenue Department sought a functional interpretation of the vending machine provision,<sup>58</sup> the court of appeals

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(10) food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food sold on a “take out” or “to go” basis; and

(11) food sold through a vending machine or by a street vendor.

<sup>49</sup>*Id.* § 6-2.5-5-20(c)(1).

<sup>50</sup>445 N.E.2d at 1031.

<sup>51</sup>The Department of Revenue defined confectionary items as:

Preparations of fruits, nuts or popcorn in combination with chocolate, sugar, honey, candy, or other confectionery, unless sold for cooking purposes, are not considered exempt “food” items. The method used in packaging and distributing these preparations, including the kind and size of container used, will be considered in determining [sic] the primary use for which these preparations are sold.

445 N.E.2d at 1030 (quoting Department of Revenue Circular (Revised) ST-6 (1973)).

<sup>52</sup>IND. CODE § 6-2.5-5-20(c)(10) (1982) excepts from the “food for human consumption” exemption: “food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food served on a ‘take out’ or ‘to go’ basis.”

<sup>53</sup>*Id.* § 6-2.5-5-20(c)(8) excepts from the “food for human consumption” exemption: “food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant.”

<sup>54</sup>445 N.E.2d at 1031.

<sup>55</sup>IND. CODE § 6-2.5-5-20(c)(10) (1982).

<sup>56</sup>*Id.* § 6-2.5-5-20(c)(8).

<sup>57</sup>*Id.* § 6-2.5-5-20(c)(11) excepts from the “food for human consumption” exemption: “food sold through a vending machine or by a street vendor.”

<sup>58</sup>Namely, if a nonmechanical device can fulfill the function of a machine, then the

was instead guided by the definition of vending machine from the property tax code.<sup>59</sup> The court relied on this statute, as well as case law, in adopting a definition of vending machine that included "working mechanical parts which, when activated will automatically dispense some item without further human intervention."<sup>60</sup> Therefore, the court rejected the Revenue Department's approach because it would "impermissibly strain the meaning of the statute; merely for the sake of interpretation."<sup>61</sup>

### G. Procedures Under the 1979 General Real Estate Reassessment

The 1979 general reassessment of real property in Indiana was the subject of judicial attention during this survey period. In *Indiana State Board of Tax Commissioners v. Ropp*,<sup>62</sup> the court of appeals was faced with a challenge to the validity of the 1979 reassessment procedures.<sup>63</sup> In *Ropp*, the taxpayers, owners of real estate in Pike County, challenged the State Tax Board's order equalizing the 1979 real property tax reassessments in Pike County on the grounds that the Board had failed to properly apply Regulation 17 and had failed to give proper notice to the township trustees of Pike County regarding an equalization hearing held by the Board.<sup>64</sup>

The Pike County taxing officials used the thirty percent factor in calculating the 1979 reassessments of Pike County real property. Consequently, the State Tax Board issued an equalization order modifying the Pike County reassessments by removing the thirty percent adjustment factor.<sup>65</sup> The taxpayers in *Ropp* contended that the unappealed *McCloskey*

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nonmechanical device comes within the vending machine provision for tax purposes. 445 N.E.2d at 1031.

<sup>59</sup>The property tax code defines a vending machine as:

(b) For purposes of this section, the term "vending machine" means a machine which dispenses goods, wares, or merchandise when a coin is deposited in it and which *by automatic action* can physically deliver goods, wares, or merchandise to the depositor of the coin.

IND. CODE § 6-1.1-3-8(b) (1982) (emphasis added).

<sup>60</sup>445 N.E.2d at 1032.

<sup>61</sup>*Id.*

<sup>62</sup>446 N.E.2d 20 (Ind. Ct. App. 1983).

<sup>63</sup>In 1976, the State Board of Tax Commissioners adopted Regulation 17, Real Property Appraisal Manual, in connection with a statewide reappraisal of real property. 50 IND. ADMIN. CODE §§ 2-1 to 2-13 (1979). As promulgated, Regulation 17 provided that "the value of all land and improvements should be [reduced by] 30 percent, an inflation adjustment factor, to determine true cash value." 446 N.E.2d at 21-22. The 30% inflation adjustment factor was challenged in *McCloskey v. State Bd. of Tax Comm'rs*, Cause No. 37226 (Hancock Cir. Ct. Oct. 24, 1977). In that case the trial court enjoined the enforcement of the 30% factor of Regulation 17. Rather than appealing the *McCloskey* decision, the State Tax Board sent a letter to *all* taxing officials in the state stating that the 30% factor should be disregarded in making the 1979 general reassessment.

<sup>64</sup>446 N.E.2d at 22.

<sup>65</sup>*Id.*

decision was not binding on the Pike Circuit Court.<sup>66</sup> The taxpayers also asserted that, because Regulation 17 was duly promulgated by the State Board, that regulation could only be rescinded in the same way that it was enacted. Consequently, the Board's more expedient course of action, sending letters to taxing officials advising them of the Board's decision not to follow its own regulation, was of no force and effect. Therefore, the taxpayers contended that Regulation 17, with the thirty percent inflation adjustment factor, should remain in full force and effect.<sup>67</sup>

The court only addressed one of these contentions, namely, the validity of the regulation. The court observed that the legislature provided in Indiana Code sections 4-22-2-2<sup>68</sup> and 4-22-2-11<sup>69</sup> that all rules and regulations of state agencies, in order to be considered validly promulgated and

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<sup>66</sup>*Id.* at 22-23 (citing *Hagood v. State*, 395 N.E.2d 315 (Ind. Ct. App. 1979) (unappealed decision of a trial court binding only as to the parties to the action and is not *stare decisis*)).

<sup>67</sup>446 N.E.2d at 23.

<sup>68</sup>This section provides:

(a) All rules, regulations . . . which the issuing agency intends to have the effect or force of law but which are not promulgated, approved and filed as rules in conformity with the provisions of this chapter, *shall be invalid, void and of no force or effect after the first day of January 1978.* . . .

(b) Within thirty (30) days after January 1, 1978, the secretary of state shall deliver to the legislative council a copy of every rule in effect on that day according to his records. Between February 1, 1978, and January 1, 1979, the secretary of state shall deliver to the council a copy of every rule filed with his office after January 1, 1978, within thirty (30) days from the date it was filed. The council shall compile the rules according to the format and numbering system it develops under section 7.1(c) [4-22-2-7.1(c)] of this chapter and arrange for them to be converted to computer data base form. On or before January 1, 1979, the council shall deliver to each agency a computer printout or galley proofs of the agency's rules as they are known to the council and the secretary of state. On or before March 1, 1979, the governing body of the agency shall by resolution certify to the council and the secretary of state from the printout or galley proofs those rules which are in effect on December 31, 1978. If there is no governing body, the chief administrative officer of the agency shall make the certification by affidavit. In the case of an agency that fails to make a certification as to any of its rules within the time required, the secretary of state shall examine the computer printout or galley proofs and make the certification by affidavit. After March 1, 1979, the legislative council shall arrange to have the certified rules indexed and published as the "Indiana Administrative Code."

IND. CODE § 4-22-2-2 (1982) (emphasis added).

<sup>69</sup>This section provides:

(a) Subject to the provisions of this section, any such rule (including matter incorporated by reference in compliance with section 7.1 [4-22-2-7.1] of this chapter) adopted, approved, recorded, and published as provided in this chapter shall be . . . prima facie evidence that said rule was adopted, approved, and filed in accordance with this chapter and that the text of the rule published is the text adopted; however, the 1979 edition of the Indiana Administrative Code shall be conclusively presumed to contain the accurate, correct, and complete text of all rules in effect on December 31, 1978. *All rules filed with the secretary of state before December*

in effect on December 31, 1978, were to be certified to the Legislative Council and to the Secretary of State on or before March 1, 1979, and that state agency rules and regulations not certified were deemed void.<sup>70</sup> Because the thirty percent inflation adjustment factor had never been certified and published as required by Indiana Code sections 4-22-2-2 and 4-22-2-11, the court concluded that "whatever vitality [the thirty percent factor] may once have had, it expired pursuant to statutory enactment prior to its application on April 2, 1979, by the Pike County taxing officials."<sup>71</sup>

### H. Federal Taxation

1. *Family Trusts*.—In *Schulz v. Commissioner*,<sup>72</sup> the Seventh Circuit Court of Appeals examined the use of "family trusts"<sup>73</sup> for federal income tax purposes. The *Schulz* decision involved a consolidated appeal of three cases from the United States Tax Court<sup>74</sup> and concerned two trusts—the Schulz family trust and the White family trust. The taxpayers had created family trusts based on forms and information in prepackaged kits that they had purchased. Pursuant to the instructions in these kits, the taxpayers conveyed all of their real and personal property to the trusts, as well as their right to receive salaries from their employers. In return, the taxpayers, as grantors of the trusts, received shares representing their beneficial interests in the trusts.<sup>75</sup>

The taxpayers were attempting to convert nondeductible, personal expenses into administrative or business expenses of the trusts. Among the administrative expenses the trusts deducted were home and automobile insurance premiums, educational expenses, household expenses, and health

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2, 1978, but not compiled in the 1979 edition of the *Indiana Administrative Code* are void.

*Id.* § 4-22-2-11 (emphasis added).

<sup>70</sup>446 N.E.2d at 24.

<sup>71</sup>*Id.*

<sup>72</sup>686 F.2d 490 (7th Cir.1982).

<sup>73</sup>Family trusts generally have the following features in common: (a) the assignment of the grantor's right to future income to the trust; (b) the assignment of substantially all of the grantor's property to the trust; (c) virtually unlimited discretion on the part of the trustees with respect to management and distribution of trust property; (d) the trust beneficiaries are generally the grantor's children or other members of his family; and (e) the trustees are the grantor, the grantor's spouse, and a third party. Typically, the grantor will contract to serve as the manager or consultant for the trust. His salary is determined by the trustees and can be changed at any time the trustees deem appropriate. The net profits of the trust are then either distributed to the beneficiaries or left to accumulate as trust property.

<sup>74</sup>*Schulz v. Commissioner*, 41 T.C.M. (CCH) 599 (1980); *LaVerne Schulz Family Trust v. Commissioner*, 41 T.C.M. (CCH) 599 (1980); and *White v. Commissioner*, 41 T.C.M. (CCH) 931 (1981).

<sup>75</sup>686 F.2d at 491-92.

care expenses.<sup>76</sup> The taxpayers also sought to spread the income generated by services of the grantors (and allegedly assigned to the trusts) among the grantors, the trusts, and potentially, the trust beneficiaries. They paid themselves a consultant's fee or management fee in an amount less than the trust income, in an effort to shift income to their children.<sup>77</sup> Because the amounts of these fees were completely within the grantors' control in their capacities as trustees, the ability to shift income between the grantors and their children was unlimited.

The Seventh Circuit held that the taxpayers could not avoid taxation in this manner, basing its decision on three different doctrines.<sup>78</sup> First, adopting a substance over form analysis, the court stated that the trusts were merely "transparent attempts" to convert family expenses into trust administration expenses.<sup>79</sup> The court added that "if this device worked, [these taxpayers] would, unlike the rest of us, make all of their consumptive expenditures with pre-tax dollars."<sup>80</sup> Under the substance over form analysis, the existence of the trusts could simply be ignored for federal income tax purposes regardless of the trusts' validity under state law. All the issues in the *Schulz* case could have been resolved by this approach because all the income and expenses of the trusts could be treated as directly incurred by the taxpayer.<sup>81</sup>

The court also sustained the Internal Revenue Service's position under a second doctrine, holding that the arrangements between the grantors and the trusts constituted an anticipatory assignment of income.<sup>82</sup> In the White family trust the taxpayer was a salaried employee of an unrelated company. He assigned all his rights to future wages from his employer to the trust. The taxpayer in the Schulz family trust operated a dairy farm and real estate business as a sole proprietor prior to assigning those assets to the trust.<sup>83</sup> The court relied on the assignment of income principles set forth in *Lucas v. Earl*<sup>84</sup> and held that the income attributable

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<sup>76</sup>*Id.* at 492. The taxpayers excluded from gross income the value of the homes and meals provided to them on the basis that these items qualified under section 119 of the Internal Revenue Code (Code). I.R.C. § 119 (1982). The cost of health and accident insurance was excluded by the taxpayers from gross income under section 106 of the Code. I.R.C. § 106 (1982)

<sup>77</sup>686 F.2d at 492.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 493.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* The court explained that it was not relying solely on this approach because it would be inefficient and costly for the Internal Revenue Service to audit every return, and the possibility of avoiding an audit would encourage this form of tax evasion. *Id.*

<sup>82</sup>*Id.* at 493-94.

<sup>83</sup>*Id.* at 491-92. Mrs. Schulz conveyed her right to receive her salary as an employee in the county courthouse to her husband, who in turn assigned it to the trust. *Id.* at 491 n.5.

<sup>84</sup>281 U.S. 111 (1930) (income is taxed to the person who earns it, regardless of attempts to divert the income elsewhere).

to the services performed by the trusts' grantors was taxed to the grantors and not to the trusts. The court reasoned that if assignment of income principles were not applied, taxpayers would be able to defeat the progressivity of the income tax rate structure by shifting income to individuals in lower tax brackets through the use of family trusts.<sup>85</sup> This would occur, the court pointed out, regardless of whether the trust income was distributed annually or upon the trust's termination,<sup>86</sup> owing to the special feature of trust taxation under sections 666 and 667 of the Internal Revenue Code (Code).<sup>87</sup>

In the case of the White family trust, involving an attempted assignment of wages, there is little doubt as to the correctness of the court's decision.<sup>88</sup> The assignment of income approach is more difficult, however, in the case of a taxpayer who derives income from business assets held by the trust, as was the case in the Schulz family trust. A taxpayer can enter into an employment arrangement or consulting arrangement with a trust, as long as that transaction is a bona fide arm's length arrangement. Therefore, the court should not have applied the assignment of income approach to the Schulz family trust. Instead, the Seventh Circuit should have recognized a distinction between the two trusts and limited its decision in favor of the Internal Revenue Service on the Schulz family trust to a finding that the trust was a sham.<sup>89</sup>

The Seventh Circuit's third basis for its decision involved the grantor trust provisions in sections 671 through 677 of the Code.<sup>90</sup> These Code sections are applicable even if the trust is a bona fide trust for federal income tax purposes. If these grantor trust provisions are not satisfied, the grantor is treated as the owner of the trust and all items of income and expenses are treated as received or incurred directly by the grantor.<sup>91</sup> In holding that the trusts clearly failed to satisfy these provisions, the *Schulz* court explicitly relied upon the detailed analysis of family trusts in *Wesenberg v. Commissioner*.<sup>92</sup>

A fundamental issue in determining if a trust satisfies the grantor trust provisions is whether the grantor has the power to take certain actions, specified in sections 674 through 677 of the Code, without the concurrence of an "adverse party."<sup>93</sup> If the grantor has the power to

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<sup>85</sup>686 F.2d at 493.

<sup>86</sup>*Id.* (citing M. CHIRELSTEIN, *FEDERAL INCOME TAXATION* ¶ 9.01, at 182 (2d ed. 1979)).

<sup>87</sup>I.R.C. §§ 666-667 (1982).

<sup>88</sup>*See* *United States v. Basye*, 410 U.S. 441 (1973); *Commissioner v. Culbertson*, 337 U.S. 733 (1949).

<sup>89</sup>*See* *Walter W. York Family Estate v. Commissioner*, 41 T.C.M. (CCH) 1612 (1981).

<sup>90</sup>I.R.C. §§ 671-677 (1982).

<sup>91</sup>Treas. Reg. § 1.671-2(c) (1956).

<sup>92</sup>69 T.C. 1005 (1978).

<sup>93</sup>These powers include the power to dispose of the corpus or income of the trust, the power to deal for less than adequate and full consideration, the power to borrow from the trust, the power to revoke, and the power to use trust income for the grantor's benefit. *See* I.R.C. §§ 674(a), 676(a), 677(a) (1982).

take these actions, he will be treated as the owner of the trust.<sup>94</sup> An adverse party is defined in section 672(a) as a “person who has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust.”<sup>95</sup> The Tax Court has held, however, that even a person who comes within the statutory definition of an adverse party will not be treated as an adverse party where it is likely that person is subservient to the grantor.<sup>96</sup>

In both trusts before the court in *Schulz*, the grantor served as one of the trustees. The other trustees of the Schulz trust were the grantor's wife and the wife of a bookkeeper employed by the trust who had no beneficial interest in the trust assets.<sup>97</sup> Two of the three trustees of the Schulz trust were authorized to make most decisions respecting the trust property. Accordingly, the grantor had authority to make decisions without the concurrence of an adverse party. Given the broad scope of the grantor's powers, the court held that the Schulz trust failed to satisfy the requirements of sections 674(a), 676(a), and 677(a) of the Code.

In the White family trust, the grantor and his spouse were the sole trustees during most of the taxable years at issue.<sup>98</sup> Although the court of appeals' reasoning on this trust is not entirely clear, it appears that the court applied a substance over form approach to determine that the grantor did in fact have uncontrolled discretion over use of the trust property. As previously noted, the court of appeals could have resolved all the issues before it by relying only on its finding that the trusts were shams. Under this approach, the trusts would not be the owners of the property for tax purposes, and the income from the property would be taxed to its true owners.

The *Schulz* opinion is not an in-depth analysis of family trusts. Nevertheless, the decision is consistent with decisions of other circuit courts of appeals,<sup>99</sup> as well as numerous decisions of the United States Tax Court.<sup>100</sup> The Seventh Circuit evidenced a hostility to family trusts that

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<sup>94</sup>686 F.2d at 495.

<sup>95</sup>I.R.C. § 672(a) (1982).

<sup>96</sup>See *Vercio v. Commissioner*, 73 T.C. 1246, 1258 (1980); *Cole v. Commissioner*, 41 T.C.M. (CCH) 820, 824 n.7 (1981).

<sup>97</sup>686 F.2d at 492. In 1976 one of the Schulz daughters, who was a beneficiary, replaced the bookkeeper's wife. The court was not concerned, however, with tax liability after 1974. *Id.*

<sup>98</sup>*Id.* When the trust was created, Mrs. White's brother was also a trustee; however, he immediately resigned and was not replaced. *Id.*

<sup>99</sup>*Vnuk v. Commissioner*, 621 F.2d 1318 (8th Cir. 1980); *Paxton v. Commissioner*, 520 F.2d 923 (9th Cir.), *cert. denied*, 423 U.S. 1016 (1975).

<sup>100</sup>See, e.g., *Vercio v. Commissioner*, 73 T.C. 1246 (1980); *Markosian v. Commissioner*, 73 T.C. 1235 (1980); *Wesenberg v. Commissioner*, 69 T.C. 1005 (1978); *Gran v. Commissioner*, T.C.M. (P-H) ¶ 80-558 (1980); *Taylor v. Commissioner*, T.C.M. (P-H) ¶ 80-313 (1980); *Horvat v. Commissioner*, T.C.M. (P-H) ¶ 77-104 (1977), *aff'd*, 671 F.2d 990 (7th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).



is shared by the other decisions. Thus, there is little doubt that a family trust in the form typically marketed to the public will not accomplish any of the taxpayer's intended tax purposes.

Furthermore, although estate tax issues were not before the court in *Schulz* and are beyond the scope of this survey, in most cases, property transferred to a family trust will be included in the grantor's gross estate.<sup>101</sup> In some cases, transfers of property can result in taxable gifts by the grantor and attempts to unwind the trust can result in taxable gifts by the beneficiaries of the trust.<sup>102</sup> Attorneys should also be aware that if a family trust is not treated as a sham for tax purposes, it will likely be treated as an association taxable as a corporation.<sup>103</sup> Accordingly, an attorney faced with resolving a family trust must proceed with utmost caution.

2. *Estate Tax—Farm Valuation.*—In *Estate of Frieders v. Commissioner*,<sup>104</sup> the Court of Appeals for the Seventh Circuit discussed some of the principles involved in the valuation of farmland for federal estate tax purposes. The farm in question was located close to two urban areas and at the time of the decedent's death a shopping center was planned for a location two miles from the farm. There had been discussion of a freeway to be constructed near the farm<sup>105</sup> and prior to the decedent's death farmland near the decedent's farm had been purchased by investors for potential commercial development.<sup>106</sup>

The Seventh Circuit held that there was substantial evidence to support the Tax Court's determination that the "highest and best use" of the farmland was as an investment for potential commercial use rather than a farming use.<sup>107</sup> The court also briefly discussed Treasury Regulation section 20.2031-1(b), which states that the fair market value of property is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."<sup>108</sup> The estate argued that the sellers of the other properties near the farm had been willing to sell their property only at a premium price and were able to hold out for that price due to the buyer's need

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<sup>101</sup>See I.R.C. §§ 2036, 2037, 2038 (1982).

<sup>102</sup>Frequently, however, the conveyance to a family trust will be incomplete for gift tax purposes because the grantor does in fact have the power to revest the property in himself. See Treas. Reg. § 25.2511-2(c), T.D. 7238, 1973-1 C.B. 565, 566; Rev. Rul. 74-365, 1974-2 C.B. 324.

<sup>103</sup>See Treas. Reg. § 301.7701-1, T.D. 7515, 1977-2 C.B. 483; Treas. Reg. § 301.7701-2, T.D. 7515, 1977-2 C.B. 483; Treas. Reg. § 301.7701-4 (1967); Rev. Rul. 75-258, 1975-2 C.B. 503.

<sup>104</sup>687 F.2d 224 (7th Cir. 1982), cert. denied, 103 S. Ct. 1251 (1983).

<sup>105</sup>Prior to the decision, the plans for the freeway were abandoned. 687 F.2d at 225.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* at 226-27.

<sup>108</sup>*Id.* at 226 (quoting Treas. Reg. § 20.2031-1(b), T.D. 6826, 1965-2 C.B. 367).

for the properties as part of an assemblage. As a result, the sales of those properties were not comparable because “unwilling sellers” were involved. Although the court acknowledged that an “unwilling seller” may exist in situations other than a forced sale,<sup>109</sup> it refused to consider “a property owner an ‘unwilling seller’ simply because his property has development potential due to its proximity to a proposed freeway.”<sup>110</sup> Thus, the court implicitly held that sellers who are willing to sell only at premium prices are not “unwilling sellers” for estate tax valuation purposes.

The court also recognized that property sold as part of an assemblage would sell at a higher price than if the same property were sold independent of other properties.<sup>111</sup> However, the court held that sales of property as part of an assemblage were comparable to sales not part of an assemblage, if the higher price resulting from the assemblage was taken into account in determining the value of the land.<sup>112</sup> The court determined that the Tax Court had recognized this fact and made an appropriate adjustment.<sup>113</sup>

The holding of the court in *Frieders* does not establish new legal principles in the valuation of real estate. The decision does, however, emphasize the importance of valuation of farmland under section 2032A of the Code in cases where the conditions of that section are satisfied.<sup>114</sup> Valuation of farmland pursuant to the formula set forth in section 2032A will often result in an estate value of less than one-half of actual fair market value. Farmland that has potential for investment or other nonfarm uses will especially benefit from valuation under section 2032A.

3. *Section 482—Allocation of Income.*—The issue of the allocation of income between an individual and a closely held corporation dependent on that individual’s services for its income was presented in *Foglesong v. Commissioner*.<sup>115</sup> Mr. Foglesong was a manufacturer’s representative who conducted his business as a sole proprietorship until August 30, 1966, when the business was transferred to a corporation of which he owned ninety-eight percent of the outstanding stock. The remaining stock was preferred stock which Mr. Foglesong transferred to his children. Mr. Foglesong worked exclusively as an employee of the corporation and received a salary for his services.<sup>116</sup>

The Internal Revenue Service contended that substantially all the net

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<sup>109</sup>687 F.2d at 227. The court referred to Treas. Reg. § 20.2031-2(b), T.D. 7432, 1976-2 C.B. 264 which provides that “[t]he fair market value . . . is not to be determined by a forced sale price.” 687 F.2d at 227.

<sup>110</sup>687 F.2d at 227.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>See I.R.C. § 2032A (1982).

<sup>115</sup>691 F.2d 848 (7th Cir. 1982).

<sup>116</sup>*Id.* at 850.

income of the corporation was attributable to services of Mr. Foglesong and should be taxed to him. In 1976, the Tax Court sustained the position of the Internal Revenue Service and allocated most of the income of the corporation to Mr. Foglesong on assignment of income principles.<sup>117</sup>

On appeal, the Seventh Circuit held that assignment of income principles could not be applied where the corporation was not a sham, where the corporation and not the individual entered into service contracts with individuals, where the corporate formalities were honored, and where there were business purposes, not tax related, for the corporate entity.<sup>118</sup> The court of appeals, however, remanded the case to the Tax Court for a determination of whether section 482 of the Code, which allows allocation of income among taxpayers,<sup>119</sup> was applicable.<sup>120</sup>

On remand, the Tax Court held that section 482 was applicable, and pursuant to that section, substantially all of the income of the corporation was allocable to Mr. Foglesong.<sup>121</sup> The Seventh Circuit again reversed the Tax Court, with three judges dissenting.<sup>122</sup>

Section 482 of the Code provides:

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.<sup>123</sup>

Section 482 applies only when "two or more organizations, trades, or businesses" are involved. Treasury Regulation section 1.482-1(a)(1) explicitly states that a sole proprietorship is an organization subject to the provisions of section 482 of the Code.<sup>124</sup>

The narrow issue before the court of appeals was whether a corporation and its sole employee could be deemed to be in separate trades or businesses although the employee's sole business activity was his employment with the corporation. The court of appeals distinguished cases the Tax Court had relied on in applying section 482, pointing out that such

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<sup>117</sup>35 T.C.M. (CCH) 1309 (1976), *rev'd*, 621 F.2d 865 (7th Cir. 1980).

<sup>118</sup>621 F.2d 865 (7th Cir. 1980).

<sup>119</sup>*See* I.R.C. § 482 (1982).

<sup>120</sup>621 F.2d at 873.

<sup>121</sup>77 T.C. 74 (1981), *rev'd*, 691 F.2d 848 (7th Cir. 1982).

<sup>122</sup>691 F.2d 848 (7th Cir. 1982) (en banc).

<sup>123</sup>I.R.C. § 482 (1982).

<sup>124</sup>Treas. Reg. § 1.482-1(a)(1) (1962).

cases involved situations in which the taxpayer engaged in business activities other than in his capacity as an employee of his controlled corporation.<sup>125</sup> The court recognized that section 482 of the Code was intended to be broadly interpreted,<sup>126</sup> but determined that section 482 was primarily intended to apply to situations involving an attempt to offset the profits of one business with the losses of a separate business.<sup>127</sup> Therefore, the court of appeals concluded that a taxpayer who engages in no business activity, other than as an employee of a corporation he controls, is not engaged in a trade or business. Because section 482 of the Code can be applied only in the case of two or more commonly controlled trades or businesses, the court held that the Tax Court erred in its decision that section 482 could be applied to allocate income to Mr. Foglesong from his controlled personal service corporation.<sup>128</sup> However, the case was again remanded to the Tax Court for consideration of whether the dividends and preferred stock received by Mr. Foglesong's children should be allocated to him under assignment of income principles and whether income earned by Mr. Foglesong prior to incorporation, but subsequently paid to the corporation, should be allocated to him under the same principles.<sup>129</sup>

The Internal Revenue Service is not likely to follow the decision of the Seventh Circuit in *Foglesong*. Furthermore, the decision in *Foglesong* is inconsistent with the suggestion in the Second Circuit's decision in *Rubin v. Commissioner*<sup>130</sup> that mere employee status is a separate trade or business.<sup>131</sup> The Seventh Circuit, however, stated in *Foglesong* that the reasoning of the Second Circuit on this issue was mere dictum.<sup>132</sup>

Attorneys giving advice with respect to personal service corporations should be aware not only that *Foglesong* will probably be challenged by the Internal Revenue Service, but that other weapons are also available to the Internal Revenue Service. For example, for taxable years beginning after December 31, 1982, section 269A of the Code permits the Internal Revenue Service to allocate income, deductions, and credits between a personal service corporation and its owner-employees to clearly reflect the income of those persons or to prevent the avoidance of federal income tax.<sup>133</sup> However, section 269A is applicable only if substantially all the services of the personal service corporation are performed for one other

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<sup>125</sup>See 691 F.2d at 851-52 (discussing *Borge v. Commissioner*, 405 F.2d 673 (2nd Cir. 1968), cert. denied sub nom. *Danica Enterprises v. Commissioner*, 395 U.S. 933 (1969); *Ach v. Commissioner*, 42 T.C. 114 (1964), aff'd, 358 F.2d 342 (6th Cir.), cert. denied, 385 U.S. 899 (1966)).

<sup>126</sup>691 F.2d at 850.

<sup>127</sup>*Id.* at 851-52.

<sup>128</sup>*Id.* at 852.

<sup>129</sup>*Id.*

<sup>130</sup>460 F.2d 1216 (2nd Cir. 1972).

<sup>131</sup>*Id.* at 1218.

<sup>132</sup>691 F.2d at 852 n.5.

<sup>133</sup>I.R.C. § 269A (1982).

corporation, partnership, or other entity<sup>134</sup> and the principal purpose of forming the corporation is the avoidance of federal income tax.<sup>135</sup> In addition, attorneys advising personal service corporations must be aware of potential problems involving personal holding company tax<sup>136</sup> and accumulated earnings tax.<sup>137</sup> Finally, even if *Foglesong* represents the correct interpretation of section 482, care must be taken that: (a) all contracts with third parties are with the corporation and not the shareholder employee; (b) all corporate formalities are observed; (c) the shareholder-employee engages in no other business activities; and (d) a written employment agreement is entered into between the corporation and the employee.

4. *Scholarships and Fellowship Grants*.—The meaning of “scholarship” or “fellowship grant” was addressed in *Field v. Commissioner*,<sup>138</sup> a case of first impression for the Seventh Circuit. Section 117 of the Code provides that any amount received as a “scholarship at an educational organization” or “as a fellowship grant” is not included in gross income.<sup>139</sup> The Code does not define “scholarship” or “fellowship grant.” However, Treasury Regulation section 1.117-4(c) provides that a scholarship or fellowship grant does not include “any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.”<sup>140</sup>

In sustaining the validity of this regulation, the United States Supreme Court held, in *Bingler v. Johnson*,<sup>141</sup> that payments in exchange for substantial services do not come within the definition of scholarships or fellowship grants. The Court explained in *Bingler* that scholarships and fellowship grants must come within the usual understanding of “relatively disinterested, ‘no strings’ educational grants, with no requirement of any substantial *quid pro quo* from the recipients.”<sup>142</sup>

An exception to the rule that compensation for services cannot be considered a scholarship or fellowship grant exists for compensation to an individual for teaching, research, or other services in the nature of part-time employment if: (a) the individual is a candidate for a degree at an educational institution, and (b) the services are required of all candidates for the degree as a condition to receiving the degree.<sup>143</sup> The tax-

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<sup>134</sup>*Id.* § 269A(a)(1).

<sup>135</sup>*Id.* § 269A(a)(2).

<sup>136</sup>*Id.* §§ 541-547.

<sup>137</sup>*Id.* §§ 531-537.

<sup>138</sup>680 F.2d 510 (7th Cir. 1982).

<sup>139</sup>I.R.C. § 117 (1982).

<sup>140</sup>Treas. Reg. § 1.117-4(c) (1960).

<sup>141</sup>394 U.S. 741 (1969).

<sup>142</sup>*Id.* at 751.

<sup>143</sup>I.R.C. § 117(b) (1982); Treas. Reg. § 1.117-2(a)(2) (1960).

payer in *Field*, however, did not argue that this exception was applicable.

Against this background, the Seventh Circuit was faced with the question of whether payments to a physician in a graduate hospital residency program were excludable from gross income under section 117 of the Code. The focus of the court was appropriately on the question of whether the hospital required a substantial quid pro quo in exchange for the payments to the physician. In determining that a substantial quid pro quo was required and that the payments were therefore taxable, the court considered the nature of the services, the method of determining the amount of the payments, the fringe benefits received, and the payor's treatment of the payments.<sup>144</sup>

The nature of the services performed by the physician serving as a resident and the benefit received by the hospital from those services were the primary factors considered in determining whether the payments were excludable from the physician's income under section 117 of the Code. It was clear in this case that the physician performed substantial services of significant benefit to the hospital.<sup>145</sup> The physician argued that the evidence established that the hospital could function without residents and that accordingly the services of the residents should not be deemed to be substantial. The court of appeals held that, although an employer may be able to operate without the services of an employee, that fact does not establish that the employee did not render substantial services.<sup>146</sup>

The physician also argued that the payments should have been excluded from his income under section 117 of the Code because the residence program provided invaluable educational training. The court held that this fact was not in dispute, but was merely irrelevant. An individual can render substantial services while at the same time gaining valuable education and training. In fact, that is usually the case with individuals newly employed in a profession or skilled trade.<sup>147</sup>

The court of appeals noted that the amount of payments was determined solely by the length of time the physician spent in the program and not by financial need.<sup>148</sup> This indicated to the court that the physician was being compensated for the value of his services rather than being given payments based on need to enable him to continue his education. Moreover, the court of appeals observed that the physician received fringe benefits similar to those of hospital employees, including group insurance, paid sick leave, laundered uniforms, and paid vacations.<sup>149</sup> Implicitly, the

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<sup>144</sup>680 F.2d at 513-14.

<sup>145</sup>Dr. Field performed such services as physical examinations, medical histories, diagnosis of medical problems, caring for hospital patients and out-patients, leading therapy sessions, and substantial emergency call duty. *Id.* at 513.

<sup>146</sup>*Id.* at 514 (citing *Fisher v. Commissioner*, 56 T.C. 1201 (1971)).

<sup>147</sup>680 F.2d at 514 (citing *Proskey v. Commissioner*, 51 T.C. 918, 925 (1969)).

<sup>148</sup>680 F.2d at 513-14.

<sup>149</sup>*Id.* at 512, 514.

court reasoned that an individual who was not performing substantial services for an employer would not receive fringe benefits normally provided to employees.

Finally, the court noted that the payor<sup>150</sup> withheld state and federal income taxes and FICA taxes from the alleged scholarship payments to the taxpayer.<sup>151</sup> Thus, the payor was treating the payments as salary rather than as a scholarship or fellowship grant.

There is little doubt that the payments in the *Field* case constituted compensation rather than a scholarship or fellowship grant. In addition, most cases have held that payments to medical residents do not qualify as scholarships or fellowship grants.<sup>152</sup> Nevertheless, the court of appeals stated that it was not adopting a per se rule with respect to payments to medical residents, but preferred to decide each case on its own facts.<sup>153</sup>

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<sup>150</sup>Northwestern University Medical School made the payments to Dr. Fields and was then reimbursed by the Evanston Hospital, a related institution. *Id.* at 511 n.2.

<sup>151</sup>*Id.* at 512, 514.

<sup>152</sup>*See, e.g., id.* at 513 (citing *Cooney v. United States*, 630 F.2d 438 (6th Cir. 1980); *Meek v. United States*, 608 F.2d 368 (9th Cir. 1979); *Parr v. United States*, 469 F.2d 1156 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262 (4th Cir. 1972); *Wertzberger v. United States*, 441 F.2d 1166 (8th Cir. 1971); *Quast v. United States*, 428 F.2d 750 (8th Cir. 1970); *Tobin v. United States*, 323 F. Supp. 239 (S.D. Tex. 1971); *Kwass v. United States*, 319 F. Supp. 186 (E.D. Mich. 1970); *Burstein v. United States*, 622 F.2d 529 (Ct. Cl. 1980); *Adams v. Commissioner*, 71 T.C. 477 (1978)). *See also* Comment, *Medical Resident and Section 117—Time for a Closer Examination*, 25 ST. LOUIS U.L.J. 117, 118 & n.3 (1981). *But cf.* *Leathers v. United States*, 471 F.2d 856 (8th Cir. 1972) (refusing to reverse jury verdict in favor of resident), *cert. denied*, 412 U.S. 932 (1973).

<sup>153</sup>680 F.2d at 514 n.5.

## XIV. Torts

JOHN F. VARGO\*

### A. Introduction

The overall objectives of tort law have been the compensation of victims, the prevention of accidents, and the promotion of safety.<sup>1</sup> These objectives have existed as a part of the public policy in all jurisdictions and have been the underlying motivation in the development of the common law. Thus, the achievement in the overall promotion of safety of citizens and the compensation of the victims of wrongs is an excellent thermometer by which to measure the legal climate of a particular jurisdiction. During recent years it seems that Indiana has reached the freezing point.

Excellent examples of the "frigid waters" of Indiana legal policy can be found in the major areas of litigation in tort law—automobile accidents, medical negligence, premises liability, and products liability.

With regard to the automobile accident cases, Justice Prentice set forth the overall attitude of the Indiana Supreme Court:

The [legislative] policy [underlying the "guest statute"] also recognizes the "Robin Hood" proclivity of juries. The tendency to take from the rich and give to the needy is as American as apple pie; but unfettered, it may logically be expected to lead to the escalation of liability insurance premiums to the level where the majority of users would be either unable or unwilling to pay them. We have witnessed the development of just such conflicts in recent years, particularly with respect to both motor vehicle and professional liability insurance.

We uniformly recognize that the presence or absence of liability insurance is a factor that weighs improperly, but heavily, in jury determinations. It is for this reason that we endeavor—although frequently without success—to keep such information from juries.

. . . The guest statute may, therefore, logically be a legislative endeavor to promote financial responsibility for damages caused by the negligent operation of motor vehicles by protecting liability insurance companies from the human propensities of juries to weigh their "benevolent thumb" along with the evidence of the defendant's negligence.<sup>2</sup>

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<sup>1</sup>See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 4, at 22-23 (4th ed. 1971).

<sup>2</sup>*Sidle v. Majors*, 264 Ind. 206, 218-20, 341 N.E.2d 763, 771-72 (1976).



It is well to note that the above quotations do not have a single source, citation, or quote upon which the Indiana Supreme Court relies for its extreme distrust of a legal system wherein all citizens would be tried by their peers. What is clear from the Indiana Supreme Court's attitude is that insurance companies need protection and that this should be part of the public policy of the State of Indiana.

In the medical negligence cases, the court has addressed the issue of the conflict between the legal disability statute for minors under Indiana Code section 34-1-2-5,<sup>3</sup> which allows minors two years after reaching the age of majority to bring an action, and the limitation in the Medical Malpractice Act,<sup>4</sup> limiting the legal disability of minors to infants under six years of age.<sup>5</sup> The Indiana Supreme Court gave the following justification in response to a constitutional challenge to the change in the minor's disability section:

In balancing the interests involved here, the Legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults having a natural sympathy with them. Such communications and the persons whom they reach may to some appreciable degree stand surrogate for the lack of maturity and judgment of infants in this matter.<sup>6</sup>

Again there is absolutely no citation or authority for the above rationale and, therefore, it is presumed that the Indiana Supreme Court used their overall experience in such matters, presuming not only that an infant can communicate his ailments but also that the party in charge of the infant will take action other than taking the ailing child back to the health care provider who may have committed the negligence.

What is the overall policy of the Medical Malpractice Act in Indiana? A case in this survey period<sup>7</sup> succinctly expresses the Indiana policy:

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<sup>3</sup>IND. CODE § 34-1-2-5 (1982).

<sup>4</sup>IND. CODE § 16-9.5-3-1 (1982).

<sup>5</sup>The special limitation for minors in the Medical Malpractice Act states: No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six (6) years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.

*Id.*

<sup>6</sup>*Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 604 (Ind. 1980). For an example of the problems that can arise in cases involving medical malpractice committed against minors, see *Gooley v. Moss*, 398 N.E.2d 1314 (Ind. Ct. App. 1979).

<sup>7</sup>See *Warrick Hosp., Inc. v. Wallace*, 435 N.E.2d 263 (Ind. Ct. App. 1982); see also *infra* notes 19-30 and accompanying text.

[T]he Indiana Medical Malpractice Act was enacted to meet the problems of the rapidly escalating cost to physicians of malpractice insurance, the near unavailability of such coverage to physicians engaged in certain high risk specialties, and because "[h]ealth care providers had become fearful of the exposure to malpractice claims and at the same time were unable to obtain adequate malpractice insurance at reasonable prices."<sup>8</sup>

This indicates that, in Indiana, an important public policy interest in the field of medical negligence is the protection of health care providers and the concomitant protection of insurance companies.

In products liability, the Indiana Supreme Court, through the legal doctrine of the open and obvious danger rule, has encouraged the marketing of unsafe products rather than encouraging safety.<sup>9</sup>

The Indiana Supreme Court's distrust of the jury system and its outward disregard of the safety incentive concepts of tort law are best expressed in the premises liability case of *Hundt v. La Crosse Grain Co.*<sup>10</sup> The plaintiff in *Hundt* obtained a jury verdict in his favor; however, the majority of the Indiana Supreme Court found that, as a matter of law, the plaintiff was contributorily negligent<sup>11</sup> and *then ordered the trial court to enter judgment for the defendant.*<sup>12</sup> The best response to such action was expressed by Justice DeBruler in his dissent:

The profundity of the majority action in this case to the future course of the law is apparent. The strongest presumption in the law must be that justice is done by the decision of an impartial trier of fact in an error free trial presided over by a judge in a duly constituted court where the parties are represented by counsel. All those criteria are present here. In my opinion, it would only be in the most extraordinary and bizarre circumstances that an appellate tribunal would be rationally justified in a civil case in supplanting its view of the evidence for that of a jury *and* the presiding judge. Yet there are no such circumstances approaching that here. The jury awarded \$25,000 to the plaintiff for injuries received when he fell down some steps constructed in a manner condemned by specific safety laws in more than one respect.<sup>13</sup>

By the clear expression of Indiana decisions, an important policy of

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<sup>8</sup>435 N.E.2d at 267 (quoting *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 589-90 (Ind. 1980)).

<sup>9</sup>See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 255 (1984).

<sup>10</sup>446 N.E.2d 327 (Ind. 1983); see *infra* notes 214-20 and accompanying text.

<sup>11</sup>446 N.E.2d at 330.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 330 (DeBruler, J., dissenting).

Indiana tort law is the protection of insurance companies and certain defendants. The overall objective of compensation of victims and the parallel objectives of accident prevention and safety promotion have been ignored to a large extent.

The Survey Article contains many decisions in a wide variety of tort litigation. By recognizing the overall Indiana policy, as described above, these decisions may be better understood.

### B. Professional Liability

This Survey Article encompasses a wide variety of professional liability litigation, including such professions as health care providers,<sup>14</sup> surveyors,<sup>15</sup> attorneys,<sup>16</sup> and agents for athletes.<sup>17</sup> Although the concept of fraudulent concealment has been highly developed in the medical negligence area, this concept is discussed in the Statute of Limitations section<sup>18</sup> because it would seem to apply in a variety of professional liability situations.

1. *Medical Negligence.*—In *Warrick Hospital, Inc. v. Wallace*<sup>19</sup> the court concluded that the provisions of the Indiana Wrongful Death Act<sup>20</sup> controlled the Medical Malpractice Act.<sup>21</sup> In *Wallace*, the widow failed to appoint a personal representative within two years of the death of her husband. The widow alleged that her husband died as a result of the medical negligence of a hospital and certain physicians. The hospital and physicians, relying on case law interpreting the Indiana Wrongful Death Act,<sup>22</sup> moved for summary judgment based upon the widow's failure to timely appoint a personal representative. The widow argued that the section of the Medical Malpractice Act that states, "a patient or his representative having a claim under this article for bodily injury or death on account of malpractice may file a complaint . . .,"<sup>23</sup> created a right of action for death separate from the Wrongful Death Act. Two of the judges in *Wallace* agreed that the Wrongful Death Act controlled the Medical Malpractice Act; therefore, the trial court's denial of the defendants' motion for summary judgment on the widow's wrongful death claim was reversed.<sup>24</sup>

The above decision is difficult to resolve with the decision in *Johnson v. St. Vincent Hospital, Inc.*<sup>25</sup> In *Johnson* the court stated the general

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<sup>14</sup>See *infra* notes 19-55 and accompanying text.

<sup>15</sup>See *infra* notes 56-63 and accompanying text.

<sup>16</sup>See *infra* notes 64-70 and accompanying text.

<sup>17</sup>See *infra* notes 71-72 and accompanying text.

<sup>18</sup>See *infra* notes 73-91 and accompanying text.

<sup>19</sup>435 N.E.2d 263 (Ind. Ct. App. 1982).

<sup>20</sup>See IND. CODE §§ 34-1-1-1 to -8 (1982).

<sup>21</sup>See *id.* §§ 16-9.5-1-1 to -10-5.

<sup>22</sup>See, e.g., *General Motors Corp. v. Arnett*, 418 N.E.2d 546 (Ind. Ct. App. 1981) (construing IND. CODE § 34-1-1-2 (1976)).

<sup>23</sup>IND. CODE § 16-9.5-1-6 (1982).

<sup>24</sup>435 N.E.2d at 268-69.

<sup>25</sup>404 N.E.2d 585 (Ind. 1980).

rule that when two statutes conflict, the later and more specific statute controls.<sup>26</sup> The result in *Johnson* was that the more restrictive Medical Malpractice Act, which limited the claims of minors, was held to control over the less restrictive disability statute for minors.<sup>27</sup> However, the situation was reversed in *Wallace*. Here, the later Medical Malpractice Act did not seem to require the appointment of a representative. Thus, if the rule of the *Johnson* case were applied, the widow should have been allowed to bring her action, as Judge Robertson argued in his dissent.<sup>28</sup> Although the majority argued that the Medical Malpractice Act was not specific enough,<sup>29</sup> it appears that the true basis of the decision was that "[t]he obvious purpose of the Medical Malpractice Act is to provide some measure of protection to health care providers from malpractice claims . . . ."<sup>30</sup> The policy of protecting physicians and other health care providers, and the associated protection of insurance companies to prevent them from raising premiums, is a major, overriding element of Indiana's tort policy, notwithstanding the traditional tort policies of compensation of the victims of wrongful acts, the prevention of future wrongs, and the promotion of safer procedures.

The continued vitality of the restrictive "community standard" requirement was confirmed in *Weinstock v. Ott*,<sup>31</sup> wherein the court gave examples of the criteria for establishing similar localities: "geographic location, population, the proximity of the localities being compared, the proximity of the localities to various medical facilities, whether the types of medical facilities available are similar, whether the localities are in the same state, and the 'character' of the localities in general."<sup>32</sup> The *Ott* court noted that the trial court is given wide discretion and refused to overturn the trial court's allowance of the qualification of a medical expert who was familiar with similar communities outside the State of Indiana.<sup>33</sup>

The *Ott* court also approved the general rule that the standard in contributory negligence is that of an ordinary person in like or similar circumstances and stated that allowances should be made for the patient's physical and mental infirmities during the time of treatment by a physician.<sup>34</sup>

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<sup>26</sup>*Id.* at 603 (citing *O'Donnell v. Krneta*, 238 Ind. 582, 154 N.E.2d 45 (1958); *Payne v. Buchanan*, 238 Ind. 231, 148 N.E.2d 537, *aff'd on rehearing*, 238 Ind. 231, 150 N.E.2d 250 (1958)).

<sup>27</sup>404 N.E.2d at 603.

<sup>28</sup>*See* 435 N.E.2d at 273 (Robertson, J., dissenting).

<sup>29</sup>*See id.* at 267.

<sup>30</sup>*Id.*

<sup>31</sup>444 N.E.2d 1227 (Ind. Ct. App. 1983).

<sup>32</sup>*Id.* at 1234.

<sup>33</sup>*Id.* at 1235.

<sup>34</sup>*Id.* at 1239-40 (quoting *Memorial Hosp. v. Scott*, 261 Ind. 27, 36, 300 N.E.2d 50, 56 (1973)).

In *Emig v. Physicians' Physical Therapy Service, Inc.*,<sup>35</sup> the plaintiff fell when she attempted to get up and walk from her wheelchair. The plaintiff was left unattended and had no restraints at the time of her fall. The defendant's expert testified, over plaintiff's objection, that in his opinion the plaintiff had been given reasonable care. Instructions to the jury stated that the jury could only consider evidence given by expert witnesses concerning the standard of care.<sup>36</sup> On appeal, the court stated that where medical decisions are concerned, only expert testimony can set forth the standard of care; however, where the issues are within the common knowledge and experience of a jury, expert testimony is improper and should be excluded.<sup>37</sup> If the decision to restrain and attend the plaintiff is a ministerial decision and not a medical decision, then the case is not premised on medical negligence, but upon common negligence, and no expert testimony is necessary. The *Emig* court held that the decision to restrain the plaintiff was ministerial and reversed the trial court's decision.<sup>38</sup>

Another case discussing ministerial versus medical acts is *Poor Sisters of St. Francis v. Catron*.<sup>39</sup> *Catron* concerned the issue of the length of time an endotracheal tube should be left in a patient. The defendant hospital argued that the issue was one appropriate for medical decisions of a physician and that hospital employees, including nurses, could not be found negligent for following physicians' orders. Although agreeing with the general rule of non-liability for following physicians' orders, the *Catron* court noted an exception to the rule: When a nurse or hospital employee knows the doctor's orders are not in accordance with normal medical practice, then it becomes the duty of the nurse or hospital employee to inform the physician, and, if the physician fails to act, to advise the hospital authorities so that appropriate action might be taken.<sup>40</sup> Failure to fulfill this duty will result in liability of the hospital for its employees' negligence.

In *Johnson v. Padilla*,<sup>41</sup> the Indiana Court of Appeals made it quite

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<sup>35</sup>432 N.E.2d 52 (Ind. Ct. App. 1982).

<sup>36</sup>*Id.* at 53.

<sup>37</sup>*Id.* at 54 (citing *Fowler v. Norways Sanitorium*, 112 Ind. App. 347, 42 N.E.2d 415 (1942); *Cramer v. Theda Clark Memorial Hosp.*, 45 Wis. 2d 147, 172 N.W.2d 427 (1969)).

<sup>38</sup>432 N.E.2d at 54-55. Although *Emig* held that the restraint of patients is a case of common rather than medical negligence, the court of appeals, in *Methodist Hosp. v. Rioux*, 438 N.E.2d 315 (Ind. Ct. App. 1982), held that a complaint alleging the hospital's negligent failure to prevent the patient from falling and injuring herself fell within the broad language of the Medical Malpractice Act. *Id.* at 317. If both *Emig* and *Rioux* are correct, we will then have medical panels determining non-medical issues in fall-down cases. The courts of this state are presented with the opportunity to resolve this conflict in favor of the determination of the jury system as to whether the victim will be compensated, rather than leaving the initial determination of that question to the medical malpractice system, which has shown a distressing propensity for protecting physicians and their insurers.

<sup>39</sup>435 N.E.2d 305 (Ind. Ct. App. 1982).

<sup>40</sup>*Id.* at 308 (quoting *Darling v. Charleston Community Hosp.*, 33 Ill. 2d 326, 333, 211 N.E.2d 253, 258 (1965)).

<sup>41</sup>433 N.E.2d 393 (Ind. Ct. App. 1982).

clear that, under Chapter 10 of the Medical Malpractice Act,<sup>42</sup> any party to an action before the Insurance Commissioner may invoke a court's jurisdiction for the limited purposes of determining affirmative defenses, issues of law or fact, or sanctions regarding discovery.<sup>43</sup> The powers of the court also extend to rulings on summary judgment motions and rulings on factual issues not requiring expert opinions.<sup>44</sup>

The Fourth District Court of Appeals of Indiana held, in *Methodist Hospital, Inc. v. Rioux*,<sup>45</sup> that the Medical Malpractice Act is broad enough to include plaintiffs falling as a result of a hospital's alleged negligent care. In *Rioux*, the plaintiff forcefully argued that such cases were not based upon medical negligence but were cases of ordinary negligence. The *Rioux* court cited the extremely broad language of the Act<sup>46</sup> and concluded that a fall-down case was within such language.<sup>47</sup> If the *Emig*<sup>48</sup>

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<sup>42</sup>See IND. CODE §§ 16-9.5-10-1 to -5 (1982).

<sup>43</sup>433 N.E.2d at 395 (citing IND. CODE § 16-9.5-10-1 (1982)). Jurisdiction of the court is invoked pursuant to IND. CODE § 16-9.5-10-2 (1982). Code section 16-9.5-10-1 confers jurisdiction upon the court to make preliminary rulings upon matters covered by section 16-9.5-9-7(c): "That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury." Section 16-9.5-10-1 denies court jurisdiction to make a preliminary ruling on matters covered by section 16-9.5-9-7(a), (b) and (d):

(a) The evidence supports the conclusion that defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.

(b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.

. . . . .

(d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.

In *Johnson*, the plaintiff alleged that the defendant doctor negligently performed a certain medical procedure, without alleging that the defendant negligently decided to perform the procedure or negligently supervised another doctor's performance of it. The defendant filed an affidavit stating that her only contact with the plaintiff's case was to concur in the opinion of a second doctor that the medical procedure should be performed. The court held that the issue of whether the defendant actually performed the procedure, as alleged by the plaintiff, was an issue of fact not requiring expert opinion. 433 N.E.2d at 396. Thus, under code sections 16-9.5-10-1 and 16-9.5-9-7(c), the trial court properly assumed jurisdiction for the limited purpose of ruling on the defendant's motion for summary judgment. 433 N.E.2d at 396.

<sup>44</sup>433 N.E.2d at 396.

<sup>45</sup>438 N.E.2d 315 (Ind. Ct. App. 1982).

<sup>46</sup>See IND. CODE §§ 16-9.5-9-1, -2, and 16-9.5-1-1(a)(1), (g), (h), (i) (1982), cited in 438 N.E.2d at 316.

<sup>47</sup>438 N.E.2d at 317. The court held that the Medical Malpractice Act applies to any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished by the hospital for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

*Id.* at 316.

<sup>48</sup>*Emig v. Physicians' Physical Therapy Service, Inc.*, 432 N.E.2d 52 (Ind. Ct. App. 1982); see *supra* notes 35-38 and accompanying text.

case is correct in stating that fall-down cases are ones of ordinary negligence, then such cases should be outside the Medical Malpractice Act, and conflicting cases such as *Rioux* should be overruled. On the other hand, if both *Emig* and *Rioux* are correct in stating that fall-down cases involve ordinary negligence, coming within the Act but not requiring the expert medical opinion of the panel, then plaintiffs should use the rationale of *Johnson* and bring such fall-down cases before a court of proper jurisdiction to determine whether expert opinion is necessary. In the latter instance, the limitations of the Medical Malpractice Act on damages and attorneys fees would be applicable. The implementation of *Rioux* for non-medical situations seems inappropriate and overly protective of insurance companies and health care providers.<sup>49</sup> Plaintiff's counsel must be extremely careful to file such fall-down cases before the Insurance Commissioner or face the possibility that the two-year statute of limitations may bar recovery.

In *Marquis v. Battersby*,<sup>50</sup> the court made it clear that expert testimony is imperative in a medical negligence case and becomes an absolute necessity for any party desiring to challenge an adverse ruling by a medical review panel, at least where the opinions of other medical experts are not in conflict.<sup>51</sup> Any reliance upon the legal doctrine of *res ipsa loquitur* will not assist the plaintiff because that doctrine is based upon common knowledge and is not applicable where expert testimony is necessary to determine the standard of care.<sup>52</sup>

Two medical cases, *Weinstock v. Ott*<sup>53</sup> and *Colbert v. Waite*,<sup>54</sup> discuss the tolling provisions of fraudulent concealment. These two cases will be discussed in the Statute of Limitations section of the article.<sup>55</sup>

2. *Surveyor's Liability*.—Following the lead of the Indiana Supreme Court, Judge Buchanan of the court of appeals decided to restrict the scope of liability of a surveyor. This decision was based, at least in part, upon the increased cost of insurance which would result from an opposite decision. In *Essex v. Ryan*,<sup>56</sup> the plaintiff, a successor in title to land previously surveyed by the defendant, was seeking damages for the surveyor's error in determining the extent of a lot. The plaintiff, relying upon ordinary negligence principles, argued that, as a successor in interest of the prior owners, he was within a class of persons who would reasonably rely upon a surveyor.<sup>57</sup> The *Essex* court's rationale for non-

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<sup>49</sup>See *supra* note 38.

<sup>50</sup>443 N.E.2d 1202 (Ind. Ct. App. 1982).

<sup>51</sup>*Id.* at 1203 (citing *Bassett v. Glock*, 174 Ind. App. 439, 368 N.E.2d 18 (1977)).

<sup>52</sup>443 N.E.2d at 1203.

<sup>53</sup>444 N.E.2d 1227 (Ind. Ct. App. 1983).

<sup>54</sup>445 N.E.2d 1000 (Ind. Ct. App. 1982).

<sup>55</sup>See *infra* notes 73-91 and accompanying text.

<sup>56</sup>446 N.E.2d 368 (Ind. Ct. App. 1983).

<sup>57</sup>*Id.* at 369.

liability read like a check list from the limited duty concepts as expressed in early casebook law—flood of litigation, increased litigiousness of our society, imposition of unwieldy duties upon providers of professional opinions, and threats of driving professionals from their chosen professions.<sup>58</sup> The court also specifically referred to “the rising cost of malpractice insurance” as a factor in its rationale for rejecting the plaintiff’s negligence claim.<sup>59</sup> Rejecting the Restatement (Second) of Torts section 552<sup>60</sup> concept of negligent misrepresentation as “a radical extension of liability,”<sup>61</sup> the *Essex* court decided to reconstruct the ancient “citadel” of privity as the factor for determining the breadth of liability.<sup>62</sup> In the instant case, however, the plaintiffs had taken an assignment of all contract rights from the prior owners, thus, the *Essex* court allowed either a contract action or a negligence action based upon the assignment.<sup>63</sup>

Again, plaintiffs are forewarned that in order to bring an ordinary negligence action under Indiana law as successors in interest in faulty survey situations, an assignment of all rights and interest of *all* predecessors in title appears to be necessary.

3. *Attorney Negligence.*—In *Whitehouse v. Quinn*,<sup>64</sup> the plaintiff appealed a summary judgment in favor of the defendant attorney. Summary judgment was granted because the plaintiff failed to bring his action within the two-year limitation period of Indiana Code section 34-1-2-2.<sup>65</sup> On appeal, the plaintiff argued that he was injured because his attorney failed to bring an action against all possible parties and secure all available remedies. The plaintiff had been injured in an automobile accident and hired the defendant as his counsel. The plaintiff and defendant entered into a contingent fee contract, and the attorney obtained a covenant not to sue from one defendant in exchange for \$50,000 and later obtained \$90,000 from another defendant in exchange for a release signed by the plaintiff.

On appeal, the court reversed in part,<sup>66</sup> stating that since the contingent fee contract contained language that the attorney would bring an action against some named defendants “and others,” the contract might be sufficient to allow plaintiff a contract action within the twenty-year statute of limitations.<sup>67</sup> However, the *Whitehouse* court was extremely

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<sup>58</sup>*Id.* at 373.

<sup>59</sup>*Id.*

<sup>60</sup>RESTATEMENT (SECOND) OF TORTS § 552 (1977).

<sup>61</sup>446 N.E.2d at 372.

<sup>62</sup>*Id.* at 373. The court allowed for an actual knowledge exception to the rule of privity where the professional has actual knowledge that a specific third person would rely on his opinion. *Id.* at 372. Such actual knowledge was absent in this case.

<sup>63</sup>*Id.* at 374-75.

<sup>64</sup>443 N.E.2d 332 (Ind. Ct. App. 1982).

<sup>65</sup>*Id.* at 335. See IND. CODE § 34-1-2-2 (1982).

<sup>66</sup>443 N.E.2d at 338.

<sup>67</sup>*Id.* at 337 (citing IND. CODE § 34-1-2-2(b) (1982)).



careful to "emphasize the narrowness of the issue as presented. The motion for summary judgment did not attack the legitimacy of a breach of contract action. Rather, it assumed an action against an attorney based upon that attorney's professional services was exclusively an action for legal malpractice based upon negligence."<sup>68</sup>

The plaintiff also attempted to overcome the summary judgment on the negligence issue by arguing constructive fraud. The court of appeals agreed that the tolling principles of constructive fraud, as enunciated in the physician-patient relationship were applicable in the attorney-client relationship.<sup>69</sup> However, the plaintiff had failed to meet his burden of showing a genuine issue of material fact existed; therefore, the summary judgment on the negligence count was allowed to stand.<sup>70</sup>

In summary, plaintiffs and attorneys should be aware that any written contract attorneys have with clients, including contingent fee contracts, may give rise to a contract action with a twenty-year statute of limitation and that fraudulent concealment can toll the two-year statute of limitation on any negligence issue.

4. *Agents for Athletes*.—Andrew Brown, a professional hockey player, brought an action for constructive fraud and breach of fiduciary duty against his agent. In *Brown v. Woolf*,<sup>71</sup> the district court denied the defendant-agent's motions for summary judgment and partial summary judgment. The agent's motions were based, in part, upon his contentions that the plaintiff could not receive punitive damages, because no proof of fraudulent intent is reflected in a constructive fraud allegation. The *Brown* court stated its conclusion that Indiana courts would not adopt a per se rule prohibiting punitive damages in constructive fraud cases and would, instead, consider the facts of each case to determine if any elements of recklessness or oppressive conduct were demonstrated to support a punitive damages award.<sup>72</sup>

### C. Statute of Limitations

1. *Fraudulent Concealment*.—The harsh rule that the statute of limitations for medical negligence begins to run from the date of the negligent act or omission<sup>73</sup> rather than from the date of discovery or knowledge of the injury was challenged in *Nahmias v. Trustees of Indiana University*.<sup>74</sup> The plaintiff allegedly was injured because of negligent treatment with radiation therapy; however, the plaintiff did not have

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<sup>68</sup>443 N.E.2d at 336 (footnote omitted).

<sup>69</sup>*Id.* at 339 (citing *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891 (1956)).

<sup>70</sup>443 N.E.2d at 339.

<sup>71</sup>554 F. Supp. 1206 (S.D. Ind. 1983).

<sup>72</sup>*Id.* at 1208.

<sup>73</sup>See IND. CODE § 26-9.5-3-1 (1982).

<sup>74</sup>444 N.E.2d 1204 (Ind. Ct. App. 1983).

knowledge of any possibly negligent conduct until almost two years after the treatment. The plaintiff brought his action within two years of being advised by another doctor of the possible negligence, but later than two years after the allegedly negligent act. Summary judgment was granted for defendants, and plaintiff appealed. The *Nahmias* court, following Indiana precedent, affirmed summary judgment against the plaintiff.<sup>75</sup>

The court discussed the fraudulent concealment concept, stating that the concept was not an exception to the two-year rule but was based upon equitable estoppel precluding the defendant from asserting the statutory bar.<sup>76</sup> Because the plaintiff did not raise the issue, however, he could not avail himself of the rule.

The fraudulent concealment rule was further explored in *Weinstock v. Ott*.<sup>77</sup> The *Ott* court stated that because of the fiduciary relationship between physician and patient, the physician has a duty to disclose material information to his patient and the failure to do so is fraudulent concealment.<sup>78</sup> This duty to disclose ends when the physician-patient relationship is terminated, and the statute of limitations begins to run at that time.<sup>79</sup> The time period will begin to run before the physician-patient relationship ends only if the patient learns of the negligence or fails to exercise diligence to discover the negligence after obtaining information which would lead to discovery.<sup>80</sup> Because the plaintiff in *Ott* had visited other physicians during her period of treatment by the defendant, the defendant alleged that the plaintiff had lost confidence in her treatment and that this factor should weigh heavily in determining that the physician-patient relationship had ceased. The *Ott* court stated that other factors, such as plaintiff's more than fifty-five visits to the defendant-doctor over a four-year period and the fact that she had followed almost all of his medical recommendations, were a strong indication that the physician-patient relationship continued to exist.<sup>81</sup> The court cited prior Indiana authority for determining when a physician-patient relationship ends:

“There are many factors that enter into the analysis of determining when a physician-patient relationship ends. The subjective views of parties are important and a consideration must be given

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<sup>75</sup>*Id.* at 1211. The court held that the plaintiff's claim was time-barred whether the statute of limitations section of the Medical Malpractice Act was strictly construed as an “occurrence” statute, *cf.* *Alwood v. Davis*, 411 N.E.2d 750 (Ind. Ct. App. 1980) (construing IND. CODE § 34-4-19-1 (1976), the predecessor to the present malpractice limitations section), or as a “discovery” statute. *Cf.* *Toth v. Lenk*, 164 Ind. App. 618, 330 N.E.2d 336 (1975) (construing IND. CODE § 34-4-19-1 (1976)).

<sup>76</sup>444 N.E.2d at 1208.

<sup>77</sup>444 N.E.2d at 1227 (Ind. Ct. App. 1983).

<sup>78</sup>*Id.* at 1236.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* (quoting *Toth v. Lenk*, 164 Ind. App. 618, 623, 330 N.E.2d 336, 340 (1975)).

<sup>81</sup>444 N.E.2d at 1237.

to objective factors, including, but not limited to, the frequency of visits, whether a course of treatment was prescribed by the doctor (to be followed with or without consultation), the nature of the illness, the nature of the physician's practice and whether the patient began consulting other physicians for the same malady."<sup>82</sup>

In *Wojcik v. Almase*,<sup>83</sup> the court discussed the circumstances where fraudulent concealment may extend its tolling provisions beyond the patient's last visit to the allegedly negligent physician. In *Wojcik*, the plaintiff alleged he was injured by a subclavian catheter which broke off and became lodged in his chest. He brought his action against the attending physicians alleging, in part, that the physicians were negligent. The physicians asserted that the two-year statute of limitations<sup>84</sup> barred plaintiff's recovery. The plaintiff responded that fraudulent concealment tolled the statute. The *Wojcik* court stated that, generally, the tolling provisions of fraudulent concealment cease when the physician-patient relationship ends,<sup>85</sup> and the patient's last visit to the physician, in certain circumstances, may not be the date when the patient ceases to rely on the physician or when the relationship ends:

We agree with the proposition that where a doctor represents that a certain condition is to be expected to continue into the future or prescribes a course of treatment to be followed for a period of time, a constructive fraud can be found which will delay the running of the statute of limitations for the time the doctor has indicated. However, we also believe that where no such representations are made the patient's reliance does not continue beyond the time he and the doctor ceased their association.<sup>86</sup>

Although the *Wojcik* court agreed with the trial court that the plaintiff's action came too late, the case cited several Indiana decisions that have extended the tolling powers of fraudulent concealment beyond the patient's last visit to the physician.<sup>87</sup> But the *Wojcik* court made it clear that a mere discharge from care, with nothing more, is insufficient to extend the fraudulent concealment rationale.<sup>88</sup>

In *Colbert v. Waitt*,<sup>89</sup> the court of appeals stated, in dicta, that two

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<sup>82</sup>*Id.* (quoting *Adams v. Luros*, 406 N.E.2d 1199, 1203 (Ind. Ct. App. 1980)).

<sup>83</sup>451 N.E.2d 336 (Ind. Ct. App. 1983).

<sup>84</sup>See IND. CODE § 16-9.5-3-1 (1982).

<sup>85</sup>451 N.E.2d at 339 (quoting *Guy v. Schuldt*, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956)).

<sup>86</sup>451 N.E.2d at 340.

<sup>87</sup>*Id.* (citing *Carrow v. Streeter*, 410 N.E.2d 1369 (Ind. Ct. App. 1980); *Adams v. Luros*, 406 N.E.2d 1199 (Ind. Ct. App. 1980)).

<sup>88</sup>451 N.E.2d at 340-41.

<sup>89</sup>445 N.E.2d 1000 (Ind. Ct. App. 1982).

types of conduct by a physician can toll the statute of limitations—active or passive fraud.<sup>90</sup> Failure to meet an affirmative duty to disclose material information, usually arising from the fiduciary relationship between physician and patient, is a good example of the passive fraud situation.

The fiduciary relationship between physician and patient giving rise to the affirmative duty of disclosure of material information also exists in the attorney-client relationship; therefore, all of the same rules of the equitable estoppel concept of fraudulent concealment should apply.<sup>91</sup>

2. *Accrual*.—The two-year statute of limitations for negligence begins when a cause of action accrues,<sup>92</sup> and accrual occurs “at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment.”<sup>93</sup> In *Babson Brothers Co. v. Tipstar Corp.*,<sup>94</sup> the plaintiff had problems with a milking parlor, beginning shortly after installation and continuing over a four-year period of time; however, the exact source of the problems were unknown until four years after installation. The plaintiff received a verdict and judgment, and the defendant-installer alleged on appeal that the cause of action accrued when the plaintiff first encountered the problems with the milking parlor. The *Babson* court rejected this contention and stated that, generally, the factfinder should determine the time when a cause of action accrued.<sup>95</sup>

In *Chacharis v. Fadell*,<sup>96</sup> a defamation action based upon the pleadings of a prior action, the court of appeals stated that the statute of limitations began to run at the time of publication (filing) and *not* when the determination was made that the pleadings were not privileged.<sup>97</sup>

3. *Legal Disability*.—In *Duwes v. Rodgers*,<sup>98</sup> the plaintiff alleged that due to the pain and disablement she suffered in an automobile accident, she was a “distracted person” of unsound mind<sup>99</sup> sufficient to toll the two-year statute of limitations.<sup>100</sup> Under Indiana Code section 34-1-2-5, a person under legal disability may bring his action within two years after the disability is removed,<sup>101</sup> and “under legal disabilities” is defined to include persons of unsound mind.<sup>102</sup> The *Rodgers* court held, however, that the plaintiff’s evidence was insufficient to establish the unsound mind

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<sup>90</sup>*Id.* at 1003.

<sup>91</sup>See *supra* notes 64-70 and accompanying text (discussing *Whitehouse v. Quinn*, 443 N.E.2d 332 (Ind. Ct. App. 1982)).

<sup>92</sup>See IND. CODE § 34-1-2-2(1) (1982).

<sup>93</sup>*Scates v. State*, 178 Ind. App. 624, 625, 383 N.E.2d 491, 493 (1978).

<sup>94</sup>446 N.E.2d 11 (Ind. Ct. App. 1983).

<sup>95</sup>*Id.* at 14 (citing *Montgomery v. Crum*, 199 Ind. 660, 161 N.E. 251 (1928); *Rees v. Heyser*, 404 N.E.2d 1183 (Ind. Ct. App. 1980)).

<sup>96</sup>438 N.E.2d 1032 (Ind. Ct. App. 1982).

<sup>97</sup>*Id.* at 1033.

<sup>98</sup>438 N.E.2d 759 (Ind. Ct. App. 1982).

<sup>99</sup>See IND. CODE § 34-1-67-1(3), (6) (1982).

<sup>100</sup>See *id.* § 34-1-2-2(1).

<sup>101</sup>*Id.* § 34-1-2-5.

<sup>102</sup>*Id.* § 34-1-67-1(6).

requirement.<sup>103</sup> Because the plaintiff did not file her action within the required two-year period from the date of the accident, and because she did not meet the requirements of the legal disability statute, summary judgment in favor of defendant was affirmed.<sup>104</sup>

4. *Tort Claims Notice*.—The notice requirement of the Indiana Tort Claims Act has become an area where “form” rules over “substance”. In *Teague v. Boone*,<sup>105</sup> the court of appeals, following Indiana Supreme Court precedent, held that the government’s actual knowledge of the incident which gave rise to the action was insufficient to meet the notice requirement or to estop the government’s assertion of immunity.<sup>106</sup> The *Teague* court made it clear that the object of the Tort Claims Act<sup>107</sup> was to limit liability and protect the assets of the state,<sup>108</sup> irrespective of the merits of any claim an injured party might assert. The plaintiff must notify the specific state agency involved in the incident giving rise to the plaintiff’s injury;<sup>109</sup> therefore, plaintiffs should be extremely careful that they notify all potentially responsible state or governmental agencies because any mistake would be fatal to a meritorious claim.

5. *Construction Deficiencies—Ten-year Limitation*.—In *Capitol Builders, Inc. v. Shipley*,<sup>110</sup> the plaintiff-owner brought an action against the defendant-builder for damages due to defective (spalling) brick. The owner received judgment, and the builder appealed. The action was based upon negligence in selecting *and* installing bricks, and breach of the warranty to construct a home “in a good and workmanlike manner.”<sup>111</sup> The defendants argued that the two-year statute of limitations for injury to personal property applied since the brick was personal property when selected.<sup>112</sup> In support of this contention, defendants cited a case in

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<sup>103</sup>438 N.E.2d at 761. The plaintiff apparently relied on the portion of the statute that defines “of unsound mind” as including “distracted persons.” See IND. CODE § 34-1-67-1(3) (1982). The *Rodgers* court, in the absence of Indiana precedent, borrowed its definition of “distracted person” from an Illinois case, which defined such a person as one who is “incapable of acting rationally in the ordinary affairs of life, and of comprehending the nature and value of property, as to be incapable of transacting, or procuring to be transacted, ordinary business.” *Snyder v. Snyder*, 142 Ill. 60, 67, 31 N.E. 303, 305 (1892), *quoted in* 438 N.E.2d at 761. For purposes of the Indiana statute, the *Rodgers* court tightened up the definition and stated that “a distracted person is a person who by reason of his or her mental state is incapable of managing or procuring the management of his or her ordinary affairs.” 438 N.E.2d at 761. Although the plaintiff was in pain and physically disabled, her condition did not justify the finding that she was of unsound mind. *Id.*

<sup>104</sup>438 N.E.2d at 761.

<sup>105</sup>442 N.E.2d 1119 (Ind. Ct. App. 1982).

<sup>106</sup>*Id.* at 1120 (citing *Geyer v. City of Logansport*, 267 Ind. 334, 370 N.E.2d 333 (1977); *City of Indianapolis v. Uland*, 212 Ind. 616, 10 N.E.2d 907 (1937)).

<sup>107</sup>IND. CODE §§ 34-4-16.5-1 to -19 (1982).

<sup>108</sup>442 N.E.2d at 1120.

<sup>109</sup>*Galovick v. Board of Comm’rs*, 437 N.E.2d 505 (Ind. Ct. App. 1982).

<sup>110</sup>439 N.E.2d 217 (Ind. Ct. App. 1982).

<sup>111</sup>*Id.* at 220.

<sup>112</sup>*Id.* at 226; see IND. CODE § 34-1-2-2 (1982).

which a products liability action was brought against a brick manufacturer.<sup>113</sup> The court of appeals rejected the defendant's argument and stated that since the brick became permanently incorporated into the building, it became real property,<sup>114</sup> and the ten-year statute of limitations for deficiencies in construction of improvements to real property was applicable.<sup>115</sup>

#### D. Limited Duty

In negligence cases, Indiana law has developed a protection for defendants and their insurance companies by following one of the earliest methods of barring plaintiffs' recovery—limited duty. Whereas the overall trend in most jurisdictions over the past fifty years has been to expand the duties owed,<sup>116</sup> Indiana law has steadily retrenched toward lesser and lesser protection for injured victims.

1. *Governmental Liability*.—In *Department of Natural Resources v. Morgan*,<sup>117</sup> the plaintiff received a jury verdict and judgment for wrongful death and personal injuries. The death and damages resulted when the deceased's vehicle accidentally left the road surface and landed in the water of a nearby strip-mining pit. The plaintiff alleged that the Department of Natural Resources had a duty to act reasonably to insure that open water-filled pits were placed far away from roads or were guarded sufficiently to protect vehicles from entering the pits should they accidentally veer from the road surface.<sup>118</sup> This duty was alleged to arise either pursuant to the strip-mining law, under which the Department gave permits to coal companies to conduct strip-mining,<sup>119</sup> or under the common law.<sup>120</sup>

The court of appeals reversed the jury verdict based upon an interpretation of the strip-mining law as only effecting a duty to protect the land and the general public. Under this statute there was no duty to protect motorists.<sup>121</sup> In addition, the court of appeals said there was no common law duty because the Department had no direct control over the instrumentality that caused the harm—the strip pit.<sup>122</sup> Finally, the court

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<sup>113</sup>See *Adcor Realty Corp. v. Mellon-Stuart Co.*, 450 F. Supp. 769 (N.D. Ohio 1978).

<sup>114</sup>439 N.E.2d at 227.

<sup>115</sup>*Id.* (citing IND. CODE § 34-4-20-2 (1982)).

<sup>116</sup>Over ten years ago, Dean Prosser stated: "The shift [in tort law] as a whole has been heavily toward the side of the plaintiff, with expanded liability in nearly every area." W. PROSSER, *Preface* to HANDBOOK OF THE LAW OF TORTS at xi (4th ed. 1971).

<sup>117</sup>432 N.E.2d 59 (Ind. Ct. App. 1982).

<sup>118</sup>*Id.* at 62.

<sup>119</sup>See IND. CODE § 14-4-2-5 (1982).

<sup>120</sup>The plaintiff relied on the following cases: *Elliott v. State*, 168 Ind. App. 210, 342 N.E.2d 674 (1976); *Indiana State Highway Comm'n v. Rickert*, 412 N.E.2d 269 (Ind. Ct. App. 1980), *rev'd on other grounds*, 425 N.E.2d 620 (Ind. 1981); *Indiana State Highway Comm'n v. Clark*, 371 N.E.2d 1323 (Ind. Ct. App. 1978).

<sup>121</sup>432 N.E.2d at 65.

<sup>122</sup>*Id.* at 66. The cases relied upon by the plaintiff, *see supra* note 120, were distinguished on this basis.

stated that even if there was a duty imposed upon the Department, the Indiana Tort Claims Act provided immunity.<sup>123</sup>

The Indiana Supreme Court reversed a jury verdict in favor of the plaintiff in *State v. Hall*,<sup>124</sup> based upon the trial court's misapplication of section 1983.<sup>125</sup> The plaintiff brought both a malicious prosecution and a section 1983 action against the State of Indiana and its employees and agents. The jury returned a general verdict for plaintiff, and the court of appeals upheld the jury verdict, pointing out that certain jury instructions on respondeat superior were given only on the malicious prosecution theory and not on the section 1983 action.<sup>126</sup> The Indiana Supreme Court reversed, holding that there was error in denying a directed verdict for the State on the section 1983 theory, because

a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.<sup>127</sup>

The supreme court held that the state's motion for a directed verdict should have been granted because the plaintiff's section 1983 claim was not addressed to any action that could be claimed as an implementation of execution of "official policy."<sup>128</sup>

The supreme court also reversed the court of appeals' holding that the failure to direct a verdict for the state on the section 1983 claim was harmless error.<sup>129</sup> The court of appeals determined that the jury's general verdict for the plaintiff could have been based solely on the malicious prosecution claim, since that was the only theory on which a respondeat superior instruction was given.<sup>130</sup> The supreme court reversed, holding that "[a] general verdict for the plaintiff upon a complaint which proceeded upon two theories, one good and the other bad, cannot stand unless it affirmatively appears that it rests upon the good theory."<sup>131</sup>

In dissent, Justice DeBruler noted that the defendant, in its motion

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<sup>123</sup>432 N.E.2d at 67 (citing IND. CODE § 34-4-16.5-3(7), (11) (1982)).

<sup>124</sup>432 N.E.2d 679 (Ind. 1982), *vacating* 411 N.E.2d 366 (Ind. Ct. App. 1980).

<sup>125</sup>See 42 U.S.C. § 1983 (1976).

<sup>126</sup>411 N.E.2d at 370.

<sup>127</sup>432 N.E.2d at 680 (quoting *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 694 (1978)).

<sup>128</sup>432 N.E.2d at 681.

<sup>129</sup>*Id.*

<sup>130</sup>411 N.E.2d at 370.

<sup>131</sup>432 N.E.2d at 681. The supreme court rejected the rationale of the court of appeals as "specious," stating that it "would render error in the denial of a directed verdict or motion to dismiss harmless in every case prosecuted upon multiple theories, provided the verdict was sustainable upon any one of them." *Id.*

for directed verdict, did not disclaim the applicability of section 1983 nor did it raise any legal defense at any point in the trial.<sup>132</sup> In addition, there was no appellate challenge to the jury instructions:

To this dissent it is helpful to add the observation that jury instructions are generally regarded as the means by which legal theories of liability and the manner of their proper application as well as such doctrines of *respondeat superior* are communicated to the jury. I cannot understand how this Court can consider whether a general verdict for the plaintiff and against a defendant can be set aside on the basis that it is the product of the application by the jury of a mistaken legal theory of liability or of the misapplication of a correct legal theory in the absence of an appellate challenge to jury instructions, the vehicles which finally determined and defined the applicable legal theories of liability and provided the jury with guidance in applying those theories. Here, there is no appellate challenge to the propriety of any jury instruction. This case was fairly tried on the facts at considerable cost to the plaintiff, and resulted in a jury verdict against one of the defendants. That party defendant has failed in demonstrating through the issues properly raised on appeal that the verdict is contrary to law.<sup>133</sup>

In *Hurst v. Board of Commissioners*,<sup>134</sup> the trial court granted summary judgment in favor of the defendant. The plaintiff, claiming that weeds and tall vegetation at an intersection obstructed his view and caused an automobile accident, based his action against the Board upon a statutory duty to remove weeds,<sup>135</sup> on a common law duty to remove weeds, and on negligent maintenance of an inherently dangerous intersection. The court of appeals reversed the summary judgment against plaintiff, stating that the county owed a common law duty to construct, maintain, and repair the roads within its jurisdiction and control.<sup>136</sup>

The court of appeals rejected the statutory duty argument under Indiana Code section 8-17-14-1, however, stating that this statute's purpose was to reduce the spread of weeds and obnoxious growth to surrounding farmland, and not to impose a duty upon the county to protect motorists.<sup>137</sup>

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<sup>132</sup>*Id.* at 682 (DeBruler, J., dissenting).

<sup>133</sup>*Id.* at 683.

<sup>134</sup>446 N.E.2d 347 (Ind. Ct. App. 1983).

<sup>135</sup>See IND. CODE § 8-17-14-1 (1982).

<sup>136</sup>446 N.E.2d at 351.

<sup>137</sup>*Id.* at 349-50. The court's construction of the purpose of § 8-17-14-1 was aided by an examination of IND. CODE § 32-10-4-1 (1982), which imposes upon the *state* the duty to trim natural growth at the intersections of *state highways* in order to prevent the obstruction of motorists' vision. The *Hurst* court stated that if "the Legislature [had] intended that



2. *Construction Law and Independent Contractors*.—Five Indiana cases during this survey period discussed the interplay between the liability of the parties constructing buildings and the individuals injured at such construction sites. Generally, a landowner will contract with architects, engineers, prime contractors and others to perform the design and construction of his building. The parties contracting with the owner may in turn subcontract many areas of work to be performed. When a worker is injured on the job site, courts generally examine the contracts between the various parties to determine if any particular party undertook the overall liability for the particular manner in which the workman was injured. Absent a contractual undertaking for liability or safety, the court will apply the common law rule that a contractor owes no duties to the employees of an independent contractor. This rule has five common law exceptions<sup>138</sup> and if the injured workman does not come within a specified exception, he is without a tort remedy. Combining the above situation with two additional restrictions under the Indiana Worker's Compensation law,<sup>139</sup> the exclusive remedy doctrine,<sup>140</sup> and the deplorably low benefits granted to injured Indiana employees<sup>141</sup> often results in the high costs of severe injuries being absorbed by those least able to bear such costs, the injured workers.

In *Jones v. City of Logansport*,<sup>142</sup> the plaintiff was holding a cable attached to a crane when the crane either came into contact with a high voltage line or came close to the line, resulting in electrical burns and other injuries to the plaintiff. The plaintiff brought his action against several parties including the owner of the construction site (City of Logansport), the authorized representative of the owner, and Zimpro, the prime contractor. The trial court granted summary judgment in favor of the owner's

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the counties have such a statutory duty, it would have included county intersections in [§ 32-10-4-1] or included a comparable provision under the article on county highways [IND. CODE tit. 8, art. 17 (1982)]." 446 N.E.2d at 350. However, in his concurring opinion Judge Staton pointed out that the state's duty under section 32-10-4-1 was limited by the Indiana Court of Appeals, Fourth District, in *Board of Commissioners v. Hatton*, 427 N.E.2d 696 (Ind. Ct. App. 1981), to trimming natural growth to a height of five feet, which may not achieve visual safety for motorists. 446 N.E.2d at 353 (Staton, J., concurring).

<sup>138</sup>See *infra* notes 146-47 and accompanying text.

<sup>139</sup>IND. CODE §§ 22-3-1-1 to 22-3-10-3 (1982).

<sup>140</sup>Under Indiana Code section 22-3-2-6, the rights and remedies granted to an employee under the workmen's compensation system are exclusive of all other rights and remedies, with the exception of remedies for victims of violent crimes. *See id.* § 16-7-3.6-11; *see also* Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

<sup>141</sup>Indiana's workmen's compensation system has been described as granting "horribly low benefits . . . when Indiana is compared to our sister states, including midwestern states." Townsend, *A Comparative Study of Selected Areas of Indiana Tort Law*, 5 VERDICT 4 (1983); *see infra* note 173.

<sup>142</sup>436 N.E.2d 1138 (Ind. Ct. App. 1982).

representative, and a jury verdict was entered in favor of the owner and Zimpro. The plaintiff appealed.

The court of appeals stated that the initial issue was whether the owner's representative owed a duty of care because of the contract or a voluntary assumption of a duty through affirmative conduct.<sup>143</sup> The *Jones* court found that no contractual duties existed between the owner's representative and the plaintiff<sup>144</sup> and that the plaintiff had not alleged any assumption of duty by the owner's representative.<sup>145</sup>

The plaintiff also contended that the prime contractor, Zimpro, owned a non-delegable duty and that the trial court erroneously modified plaintiff's instruction on that issue. The court of appeals reiterated the general rule that the contractor is not liable to employees of independent subcontractors.<sup>146</sup> The non-liability rule, however, has five exceptions:

- (1) the contract requires the performance of work intrinsically dangerous;
- (2) a party is by the law or contract charged with a specific duty;
- (3) the act will create a nuisance;
- (4) the act to be performed will probably cause injury to others unless due precaution is taken to avoid harm;
- (5) the act to be performed is illegal.<sup>147</sup>

The court rejected plaintiff's assertion that Zimpro was liable under exception (4) since such exception applies only to third persons and not to employees actually doing work.<sup>148</sup> The court found, however, that Zimpro did owe a non-delegable duty to the plaintiff imposed by regulations of the Indiana Commissioner of Labor,<sup>149</sup> the contract between Zimpro and the owner concerning safety, and OSHA rules and regulations.<sup>150</sup>

The plaintiff alleged that the trial court committed reversible error in denying an instruction concerning the owner's liability as to the power

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<sup>143</sup>*Id.* at 1143.

<sup>144</sup>*Id.* at 1144-45.

<sup>145</sup>*Id.* at 1145.

<sup>146</sup>*Id.* at 1147 (citing *Hale v. Peabody Coal Co.*, 168 Ind. App. 336, 343 N.E.2d 316 (1976)).

<sup>147</sup>436 N.E.2d at 1147 (citing *Denneau v. Indiana & Mich. Elec. Co.*, 150 Ind. App. 615, 277 N.E.2d 8 (1971)).

<sup>148</sup>436 N.E.2d at 1149.

<sup>149</sup>*Id.* at 1147. The court held that, as the prime contractor, Zimpro had the specific duty, under 610 IND. ADMIN. CODE § 5-1-1(6), (7), (8) (1979), to ensure compliance with the following regulation: "Power shall be cut off from electric lines within range of shovel or crane operation whenever possible. When not possible to cut off power the shovel or crane shall not be operated within electrical reach of electric transmission lines." *Id.* § 5-1-12(21), quoting in 436 N.E.2d at 1147.

<sup>150</sup>436 N.E.2d at 1148-49.

lines which it owned. The *Jones* court noted that although Indiana recognizes electricity as a dangerous element,<sup>151</sup> the duty owed is one of ordinary care under like conditions and circumstances, and *not* one of utmost care, as several other jurisdictions have held.<sup>152</sup> Under ordinary care, the distributor of electricity may either insulate or isolate its wires; however, insulation of wire need not be used unless the utility knows or should know that a segment of the population will be regularly exposed to uninsulated wire.<sup>153</sup> The *Jones* court, finding no such knowledge, rejected plaintiff's contentions.<sup>154</sup>

In *Perry v. NIPSCO*,<sup>155</sup> the trial court granted the defendant NIPSCO summary judgment, and the plaintiff appealed. The plaintiff has been ordered by his foreman to perform work twenty feet above the ground without using a scaffold or safety apparatus. When the plaintiff complained of the danger, his foreman said it would take too long to construct the scaffolding and told the plaintiff either to do the work or go home. Later the plaintiff complained to his shop steward and to a NIPSCO man wearing a white hat that read "Safety Supervisor." The shop steward did not help, and the NIPSCO man said he had no control over what the plaintiff did for his contractor. Aware of the danger, but in fear of losing his job, the plaintiff attempted to do the work and fell, severely injuring himself.<sup>156</sup>

The *Perry* court stated the general rule of non-liability for independent contractors and their employees, reiterating the five exceptions stated in *Jones*.<sup>157</sup> As to the first exception—intrinsically dangerous work—the *Perry* court stated that work is not intrinsically dangerous if the "risk of injury involved in its use can be eliminated or significantly reduced by taking proper precautions."<sup>158</sup> In the instant case, scaffolding or safety equipment would have reduced the risk; therefore, plaintiff could not meet this exception.

The specific, contractual duty exception was not available to the plaintiff because the contract between NIPSCO and plaintiff's employer, a contractor, did not impose any duty on NIPSCO.<sup>159</sup> The plaintiff further argued that NIPSCO, as owner of the property, was obligated to provide a safe place to work. The *Perry* court rejected plaintiff's contention because such a duty only involves defects in the premises or the negligent

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<sup>151</sup>*Id.* at 1150 (citing *Hedges v. Public Serv. Co.*, 396 N.E.2d 933 (Ind. Ct. App. 1979)).

<sup>152</sup>436 N.E.2d at 1150.

<sup>153</sup>*Id.* (quoting *Southern Ind. Gas & Elec. Co. v. Steinmetz*, 177 Ind. App. 96, 100, 377 N.E.2d 1381, 1384 (1977)).

<sup>154</sup>436 N.E.2d at 1151.

<sup>155</sup>433 N.E.2d 44 (Ind. Ct. App. 1982).

<sup>156</sup>*Id.* at 46.

<sup>157</sup>*Id.* at 47; see *supra* notes 146-47 and accompanying text.

<sup>158</sup>433 N.E.2d at 47 (quoting *Hale v. Peabody Coal Co.*, 168 Ind. App. 336, 343, 343 N.E.2d 316, 322 (1976)).

<sup>159</sup>433 N.E.2d at 48.

maintenance thereof.<sup>160</sup> Because the plaintiff's injury did not involve the premises or their maintenance, NIPSCO had not breached its duty as owner of the premises.

The *Perry* court stated that several factors indicated that NIPSCO had, however, assumed the supervision of safety for the construction site and owed a duty of ordinary care after such assumption.<sup>161</sup> The factors indicating such assumptions were: NIPSCO conducted regular safety meetings for employees of sub-contractors; NIPSCO had between six and thirty safety men at the job site who had "jurisdiction" of the safety program; the NIPSCO man to whom the plaintiff complained had "Safety Supervisor" written on his hard hat, and that same safety man called for an ambulance and ordered no one to touch the plaintiff after his fall.<sup>162</sup> Citing Illinois case law,<sup>163</sup> section 324A of the Restatement of Torts,<sup>164</sup> and prior Indiana law,<sup>165</sup> the *Perry* court said that the assumed duty rationale was well founded, and, viewing the evidence in the light most favorable to the (non-moving) plaintiff, held that jury questions existed that required reversal of the summary judgment against plaintiff.<sup>166</sup>

In *Johns v. New York Blower Co.*,<sup>167</sup> the court of appeals discussed the intrinsically dangerous work exception to the non-liability rule for sub-contractors. The *Johns* court noted that "[a]ppellants who have argued for expansion of the 'intrinsically dangerous work' exception have not fared well in Indiana courts."<sup>168</sup> Denying the applicability of the rule to the plaintiff, who was injured when he fell thirty feet to the ground from a steel beam upon which he was working, the court held that: (1) work is not intrinsically dangerous if the risk of injury can be eliminated or significantly reduced by taking safety precautions<sup>169</sup> and (2) the rule does not apply to employees of an independent contractor.<sup>170</sup>

The *Johns* court's rationale for not applying the intrinsically dangerous work exception was based upon the fact that on many occasions the "owner does not escape liability since, in effect, he pays the premiums for Workmen's Compensation coverage as part of his contract price."<sup>171</sup>

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<sup>160</sup>*Id.* at 49 (citing *Jones v. Indianapolis Power & Light Co.*, 158 Ind. App. 676, 687, 304 N.E.2d 337, 344 (1973)).

<sup>161</sup>433 N.E.2d at 49-50.

<sup>162</sup>*Id.*

<sup>163</sup>*Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964), *quoted in* 433 N.E.2d at 50.

<sup>164</sup>RESTATEMENT (SECOND) OF TORTS § 324A (1966), *quoted in* 433 N.E.2d at 50.

<sup>165</sup>*Board of Comm'rs v. Hatton*, 427 N.E.2d 696 (Ind. Ct. App. 1981), *quoted in* 433 N.E.2d at 50.

<sup>166</sup>433 N.E.2d at 50.

<sup>167</sup>442 N.E.2d 382 (Ind. Ct. App. 1982).

<sup>168</sup>*Id.* at 385.

<sup>169</sup>*Id.* at 386.

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* at 388.

The court also noted that if an employee of the owner had been injured, the owner's liability would have been limited by worker's compensation laws. Because there did not appear to be any valid reason to subject the owner to greater liability for employing an independent contractor to perform the work than he would have had if he had employed his own servants, the court ruled in favor of the defendant-owner.<sup>172</sup>

The *Johns* court rationale, based upon worker's compensation insurance premiums and benefits, seems outlandish in light of the fact that the benefits an Indiana employee obtains under worker's compensation are among the lowest in the country.<sup>173</sup> To further state that, because the owner's employees cannot obtain sufficient benefits for their injuries, the subcontractor's employees should likewise be limited reveals the court's reasoning as another example of the harsh climate for tort plaintiffs in this state.

In *Plan-Tec, Inc. v. Wiggins*,<sup>174</sup> the plaintiff received a jury verdict and judgment, and the defendant, who was the construction manager at the job site, appealed. The plaintiff, an employee of a subcontractor on the job site, was injured when the scaffolding on which he was working fell to the ground, six stories below. The *Wiggins* court made reference to the exceptions to the general rule of non-liability for independent contractors<sup>175</sup> and stated that the facts of the case came within the assumed

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<sup>172</sup>*Id.*

<sup>173</sup>Indiana's poor performance in compensating its injured workers is evident when compared to the benefits awarded by other states in cases of temporary total disability (TTD) and permanent total disability (PTD). See generally UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1983 (1983).

TTD occurs when the injured employee is totally unable to work during the period during which benefits are payable, but is expected to recover from his injuries and return to work. Most cases of employee injury involve TTD. *Id.* at 14. PTD occurs when an injury renders an employee permanently and totally unable to work. *Id.*

Indiana limits an injured employee to a maximum weekly payment of \$140. Only Georgia (\$135), Mississippi (\$112), and Tennessee (\$136) impose lower limits. *Id.* at 15-16.

The Chamber of Commerce analysis indicates that Indiana limits the duration of payments for both TTD and PTD to 500 weeks. *Id.* at 15. With respect to TTD, only nine other states impose a shorter time limitation—Alabama, Arkansas, Florida, Mississippi, Missouri, New Jersey, Oklahoma, Texas, and West Virginia. *Id.* at 15-17. With respect to PTD, only four other states impose any limit at all on the duration of benefits to a permanently disabled employee, and of those four, only Mississippi (450 weeks) and Texas (401 weeks) impose shorter limits than Indiana. *Id.*

Indiana limits the total amount of benefits payable to an injured employee to \$70,000 in any case, whether TTD or PTD. *Id.* at 15. Of the sixteen other states that impose any limit on total TTD payments, only Alabama (\$52,200), Arkansas (\$69,300), Mississippi (\$50,400), Oklahoma (\$58,800), Tennessee (\$54,400), and West Virginia (\$62,735) impose lower limits. *Id.* at 15-17. Of the five other states that place any limit on total PTD benefits, only Mississippi (\$50,400) and Tennessee (\$54,400) impose lower limits than Indiana. *Id.* at 15-17.

<sup>174</sup>443 N.E.2d 1212 (Ind. Ct. App. 1983).

<sup>175</sup>*Id.* at 1219. The court seems to have treated the defendant-construction manager

duty rationale expressed in *Perry*.<sup>176</sup> In the instant case the construction manager had appointed a safety director, initiated weekly safety meetings, directed certain safety precautions to be taken by the contractors, and inspected the scaffolding which fell and injured the plaintiff.<sup>177</sup> Based on these factors, the *Wiggins* court found that the jury could consider whether the construction manager had assumed either a duty to provide a safe place to work or a duty for the overall safety of the project.<sup>178</sup>

The defendant argued that, even accepting the assumed duty, its actions constituted nonfeasance rather than misfeasance, and as such, there must have been reliance by the plaintiff on the defendant's performance of the assumed duty.<sup>179</sup> Citing a 1981 court of appeals case,<sup>180</sup> the *Wiggins* court approved of the nonfeasance/misfeasance dichotomy but stated that this was a case of misfeasance.<sup>181</sup> This acceptance of the nonfeasance/misfeasance concept in a negligence action is a definite step back to the nineteenth century and quickens Indiana's march backward in time and thought. The mere fact that someone has assumed a duty should not change the normal negligence standard.

The *Wiggins* court rejected the construction manager's argument that an indemnification agreement between itself and the subcontractor, who employed the plaintiff, should shift the loss to the subcontractor.<sup>182</sup> The *Wiggins* court based its rejection of the indemnification agreement upon the fact that the work the plaintiff performed was outside the contract and, therefore, not subject to the indemnification agreement.<sup>183</sup>

In *Hixon v. Sherwin-Williams Co.*,<sup>184</sup> a homeowners' insurance company hired a local contractor, Hixon, to perform work on the homeowner's floor. Hixon subcontracted the work to the defendant Sherwin-Williams Co., who in turn hired Benkovich to perform the work. While Benkovich

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(Plan-Tec) as the owner of the land where the plaintiff was injured. The court stated that a landowner has a common law duty to exercise care to keep his property in a reasonably safe condition for invites or business visitors. This obligation exists where an injury is reasonably foreseeable in light of the hazardous nature of the instrumentalities maintained by the [landowner] on his premises. However, where the instrumentality is that of an independent contractor, the complainant must show either that the landowner assumed control of the instrumentality or had superior knowledge of the potential dangers involved in its operation.

*Id.* (citations omitted).

<sup>176</sup>*Id.* at 1220 (citing *Perry v. NIPSCO*, 433 N.E.2d 44 (Ind. Ct. App. 1982)); see *supra* notes 155-66 and accompanying text.

<sup>177</sup>443 N.E.2d at 1220.

<sup>178</sup>*Id.*

<sup>179</sup>*Id.*

<sup>180</sup>See *Board of Comm'rs v. Hatton*, 427 N.E.2d 696 (Ind. Ct. App. 1981), cited in 443 N.E.2d at 1220-21.

<sup>181</sup>443 N.E.2d at 1221.

<sup>182</sup>*Id.* at 1221.

<sup>183</sup>*Id.* at 1222.

<sup>184</sup>671 F.2d 1005 (7th Cir. 1982).

was attempting to complete the work on the homeowner's floor, the house caught fire and the insurance company and Hixon brought an action against the defendant Sherwin-Williams. The *Hixon* court stated that Benkovich was an independent contractor and, under the common law rule, Sherwin-Williams was not liable for the torts of its independent contractors.<sup>185</sup> The *Hixon* court then stated: "In an age when tort law is dominated by the search for the deep pocket, which Benkovich does not have, the common law rule may seem an anachronism . . . . The Indiana courts, explicitly adopting an accident-prevention rather than deep-pocket approach to the question, have decided . . . to retain the independent-contractor rule in full force."<sup>186</sup>

The *Hixon* court's statement that Indiana's common law concerning non-liability for independent contractors is an accident-prevention approach seems unsupportable, to say the least. As the cases in this survey period indicate, a contract between owners and others will generally not contain specific language that obligates the owner or its contractors to any specific duty to maintain a safe jobsite. The subcontractor's motivation was best expressed in *Perry*,<sup>187</sup> where the plaintiff's foreman told the plaintiff to do the work without a scaffold or quit, because it would take too long to build a safe scaffold.<sup>188</sup> Is the relegation of safety to independent contractors, who are more concerned with time demands than safety, an accident-prevention approach? In reality, owners and those who contract with owners usually attempt to avoid taking on contractual duties for subcontractors<sup>189</sup> and the conscientious contractors who attempt to effect safety procedures assume a duty that they may not have had under the contract. These contractors are penalized because of their safety-conscious attitudes while the less safety-minded contractors escape liability by not assuming any such duties.

Worker's compensation benefits are probably the least likely of all methods to prevent accidents. When an employee loses a leg above the knee, and the benefit for the loss of this limb amounts to a maximum temporary total disability benefit of \$7,280<sup>190</sup> plus \$16,875 permanent par-

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<sup>185</sup>*Id.* at 1009 (citing *Ryan v. Curran*, 64 Ind. 345, 354 (1878)).

<sup>186</sup>671 F.2d at 1009.

<sup>187</sup>*Perry v. NIPSCO*, 433 N.E.2d 44 (Ind. Ct. App. 1982); see *supra* notes 155-66 and accompanying text.

<sup>188</sup>433 N.E.2d at 46.

<sup>189</sup>See, e.g., *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212 (Ind. Ct. App. 1983). Plan-Tec, who contracted to be the construction manager with the owner, undertook to perform certain aspects of the utility contractor's job when the latter was written out of the project. Plan-Tec, however, expressly disavowed responsibility for safety considerations that were originally part of the utility contractor's undertaking. *Id.* at 1218-19.

<sup>190</sup>See IND. CODE § 22-3-3-10 (1982) (limiting temporary total disability benefits to fifty-two weeks when permanent partial impairment is also present); *id.* § -8 (limiting temporary total disability benefits to two-thirds of employee's average weekly wage); *id.* § -22 (limiting average weekly wage to \$210). Two-thirds of \$210 is \$140, multiplied by fifty-two weeks yields a maximum total temporary disability benefit of \$7,280.

tial impairment<sup>191</sup> and one year's medical bills,<sup>192</sup> it is unlikely that an owner or contractor, who may have to pay only the premiums under the contract, will want to take on the safety of a project and expose himself to much greater damages. The *Hixon* court's statement that Indiana contracting law, with the non-liability concept for independent contractors, is an "accident-prevention" approach does not survive even a superficial examination.

The *Hixon* court did examine other contentions by the plaintiff, one of which was that the defendant breached an implied or express warranty.<sup>193</sup> The *Hixon* court stated that Indiana law requires privity of contract in warranty cases involving personal injury or property damage.<sup>194</sup> This statement is not fully true. If the warranty is based upon contract, then privity is required;<sup>195</sup> however, if the warranty is in tort, no privity is required.<sup>196</sup> In *Lane v. Barringer*,<sup>197</sup> the case cited by the *Hixon* court, the majority held that privity was required *only* for warranty actions based on contract.<sup>198</sup> Judge Ratliff, concurring and dissenting, would not have required privity even in contract actions where personal injury claims were involved.<sup>199</sup> The *Hixon* court would apparently like to return to the days of yesteryear and follow eighteenth-century English law which originated the privity concept. Although the *Hixon* court's judgment, that the directed verdict in favor of the defendant should be upheld,<sup>200</sup> was probably correct, the language used by the court and the partial misstatements of warranty law are most disturbing.

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<sup>191</sup>See *id.* § -10(a)(1) (limiting the number of weeks of compensation for loss of leg above the knee to 225 weeks); *id.* § -10(b) (limiting the average weekly wage to 60% of \$125, or \$75). Multiplying 225 weeks by \$75 yields a maximum permanent partial impairment benefit for loss of a leg above the knee to \$16,875.

<sup>192</sup>See *id.* § -4.

<sup>193</sup>671 F.2d at 1010.

<sup>194</sup>*Id.* (citing *Lane v. Barringer*, 407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980)).

<sup>195</sup>Privity is divided into vertical and horizontal elements. Vertical privity is the relationship between the seller and the buyer of a product, while horizontal privity is the relationship between the buyer and other parties. Vargo, *Products Liability*, 1974 *Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 270 n.12 (1975). White and Summers have stated: "There are two basic kinds of 'non-privity' plaintiffs. The 'vertical' non-privity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant. . . . The 'horizontal' non-privity plaintiff is not a buyer within the distributive chain but one who consumes or uses or is affected by the goods." J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE*, § 11-2, at 399 (2d ed. 1980). IND. CODE § 23-1-2-318 (1982) extends privity *horizontally* to "natural persons" in the "family or household of the buyer and to his guests," but only where it is "reasonable to expect that such persons may use, consume or be affected by the goods." This extension is the most limited alternative offered under U.C.C. § 2-318 (1972).

<sup>196</sup>See Vargo, *supra* note 195, at 272-74.

<sup>197</sup>407 N.E.2d 1173 (Ind. Ct. App. 1980), *cited in* 671 F.2d at 1010.

<sup>198</sup>407 N.E.2d at 1175.

<sup>199</sup>*Id.* at 1176-77 (Ratliff, J., concurring and dissenting).

<sup>200</sup>671 F.2d at 1011.



3. *Negligent Hiring*.—Another issue discussed by *Hixon*<sup>201</sup> was the concept of negligent hiring, which, according to the court, was an accepted Indiana concept.<sup>202</sup> The Court of Appeals of Indiana again discussed the legal concept of negligent hiring of an independent contractor in *Baughner v. A. Hattersley & Sons, Inc.*<sup>203</sup> The trial court granted summary judgment for the defendant and the plaintiff appealed. The *Baughner* court affirmed the summary judgment, stating that, although Indiana recognized the tort of negligent hiring, the plaintiff had failed to prove the elements of the action.<sup>204</sup> Citing Indiana decisions<sup>205</sup> and section 213 of the Restatement (Second) of Agency,<sup>206</sup> the *Baughner* court said that the tort was generally limited to an employer who invites the public to his business, and in such situations, the employer must use care in the choice of his employees who are expected to deal with the public.<sup>207</sup>

4. *Erroneous Instruction on Sudden Emergency—Harmless Error*.—In *Taylor v. Todd*,<sup>208</sup> a pedestrian was injured when struck by the defendant's vehicle. The trial court allowed the defendant to submit a sudden emergency<sup>209</sup> instruction and the jury returned a verdict in favor of the defendant. On appeal the plaintiff urged that the giving of the sudden emergency instruction was reversible error. The *Taylor* court agreed with plaintiff that the evidence indicated that the defendant was not aware of any emergency and such awareness is a prerequisite to the doctrine of sudden emergency.<sup>210</sup> The *Taylor* court also noted, however, that the erroneous instruction on sudden emergency is usually not a basis for rever-

<sup>201</sup>*Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982).

<sup>202</sup>*Id.* at 1010 (citing *Wabash County v. Pearson*, 120 Ind. 426, 429, 22 N.E. 134, 135 (1889)). The *Hixon* court held that Sherwin-Williams was not negligent in hiring the experienced Benkovich to lay the floor and, even if it were, such negligent hiring was not the proximate cause of the accident in question. 671 F.2d at 1010.

<sup>203</sup>436 N.E.2d 126 (Ind. Ct. App. 1982).

<sup>204</sup>*Id.* at 128.

<sup>205</sup>*Tindall v. Enderle*, 162 Ind. App. 524, 320 N.E.2d 764 (1974); *Lange v. B&P Motor Express, Inc.*, 257 F. Supp. 319 (N.D. Ind. 1966), cited in 436 N.E.2d at 128.

<sup>206</sup>RESTATEMENT (SECOND) OF AGENCY § 213 (1957), cited in 436 N.E.2d at 128.

<sup>207</sup>436 N.E.2d at 128.

<sup>208</sup>439 N.E.2d 190 (Ind. Ct. App. 1982).

<sup>209</sup>In order to invoke the sudden emergency doctrine a party must prove the following facts:

"(1) That the appearance of danger or peril was so imminent that he had no time for deliberation.

(2) That the situation relied upon to excuse any failure to exercise legal care was not created by his . . . own negligence.

(3) That his conduct under the circumstances was such as the law requires of an ordinarily prudent man under like or similar circumstances."

In addition, the doctrine presumes that the actor perceives his situation as an emergency.

*Id.* at 193 (quoting *Taylor v. Fitzpatrick*, 235 Ind. 238, 247, 132 N.E.2d 919 (1956)) (citations omitted).

<sup>210</sup>*Id.* at 193-94 (citing *Baker v. Mason*, 253 Ind. 348, 242 N.E.2d 513 (1968)).

sal and is almost considered harmless error; therefore, the court affirmed the judgment for defendant.<sup>211</sup>

5. *Negligent Release of Prisoner*.—One area of duty which was not limited was the duty of a sheriff who releases a mentally confused prisoner into severe winter weather. In *Iglesias v. Wells*,<sup>212</sup> the trial court granted a 12(B)(6) motion when the plaintiff alleged that the sheriff was negligent in causing plaintiff severe injuries. The plaintiff alleged that he was indigent, had no residence, and was unable to speak or understand English. After serving a sentence for public intoxication, the plaintiff, who was wearing inadequate clothing, was released into severe winter weather by the sheriff, who had knowledge of the plaintiff's condition. Following his release, the plaintiff wandered around downtown Indianapolis for several hours until eventually suffering severe frostbite to his feet, which required surgery and partial amputation. The court of appeals reviewed the motion to dismiss, stating that it was possible to state a theory of recovery on such grounds because, under some circumstances, the sheriff would owe a duty to release prisoners in a manner which would not subject them to unreasonable danger.<sup>213</sup>

6. *Premises Liability*.—In *Hundt v. La Crosse Grain Co.*<sup>214</sup> the plaintiff opened a door, fell down some steps and injured himself. The jury awarded the plaintiff damages in a general verdict. The steps were constructed in violation of specific safety laws<sup>215</sup> and were undoubtedly dangerous. The plaintiff fell when he mistakenly opened a door leading to the basement instead of the door to a bathroom which he intended to enter. Because the plaintiff was thoroughly familiar with the premises, the *Hundt* majority ruled that, as a matter of law, the plaintiff was contributorily negligent and ordered the trial court to enter judgment in favor of the defendant.<sup>216</sup> The court's ruling in *Hundt* contained indications that the open and obvious danger rule was a factor in its decision.<sup>217</sup> In addi-

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<sup>211</sup>439 N.E.2d at 194.

<sup>212</sup>441 N.E.2d 1017 (Ind. Ct. App., 1982).

<sup>213</sup>*Id.* at 1020-21 (citing *Wagar v. Hasenkrug*, 486 F. Supp. 47 (D. Mont. 1980); *Parvi v. City of Kingston*, 41 N.Y.2d 553, 394 N.Y.S.2d 161, 362 N.E.2d 960 (1977); 60 AM. JUR. 2D *Penal and Correctional Institutions* § 17 (1972)).

<sup>214</sup>446 N.E.2d 327 (Ind. 1983).

<sup>215</sup>The uncontradicted evidence showed that the basement door opened inward, toward the steps down which the plaintiff fell, and that there was no landing inside the door and no handrail beside the steps. *Id.* at 328. At trial, the State Fire Marshall "was allowed to testify, over LaCrosse's timely objections, as to the existence, scope and content of statutes and regulations of the Administrative Building Council concerning safety features such as landings and handrails required for stairways in public buildings." *Id.*

<sup>216</sup>*Id.* at 330.

<sup>217</sup>The court's description of the facts in *Hundt* indicate that the danger to the plaintiff was open and obvious, given his familiarity with the area where he was injured. The court's holding that the plaintiff was contributorily negligent as a matter of law, *id.*, contains the predicate that the defendant was negligent, because without negligence there can be no contributory negligence. Thus, it is clear that the open and obvious nature of a danger

tion, the Indiana Supreme Court completely ignored the specifics of human reactions and human factors as described in the dissent.<sup>218</sup> The *Hundt* opinion goes to the extent of calling an unlocked door a "guard" against dangers.<sup>219</sup> What seems most disturbing is the fact that the area where the plaintiff fell was dangerous and defective.<sup>220</sup> What incentive does a defendant have to cure dangers and defects when he is told that he need not pay for the damages caused by his dangerous and defective property? Do those dangers still exist to cause further injury? What message does the *Hundt* decision send to other landowners or parties who may also violate the safety statutes and regulations established for the protection of the public of Indiana?

The dissent in another premises liability case, *Martin v. Shea*,<sup>221</sup> illustrates the conflicts that can arise between the application of the outmoded, traditional concepts of premises liability and the contentions of severely injured plaintiffs. In *Shea*, the plaintiff was a social guest at a swimming pool party at the private residence of the defendants. During some "horseplay" the plaintiff was shoved from behind by another guest and fell into the pool. The plaintiff was rendered quadriplegic after striking his head on the bottom of the pool. Under the traditional categories of premises liability—trespasser, licensee, invitee—<sup>222</sup> the plaintiff would be considered a licensee<sup>223</sup> and the defendants would owe such a limited duty to plaintiff that he could not recover.<sup>224</sup> The plaintiff alleged, however, that it was not the premises that caused him harm, but the *conduct* of the defendants in controlling other guests. Under these contentions the plaintiff alleged that the defendant owed at least a duty of reasonable care.

The majority of the *Shea* court agreed with plaintiff, held that the defendant's 12(B)(6) motion was erroneously granted, and remanded the case back to the trial court for further proceedings.<sup>225</sup> The dissent in *Shea* is an excellent expression of the "legal atmosphere" that existed over fifty

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is merely a factor in determining, and not conclusive of, the defenses of contributory negligence and assumption of risk. The supreme court's holding in *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981), that an open and obvious danger makes a product non-defective as a matter of law regardless of whether the products liability action is based on negligence or strict liability, *id.* at 1061, does not seem to comport with the *Hundt* court's conclusion that such a danger is part of the defense of contributory negligence or possibly assumption of risk. See Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 255 (1984).

<sup>218</sup>See 446 N.E.2d at 331 (DeBruler, J., dissenting).

<sup>219</sup>*Id.* at 329.

<sup>220</sup>See *supra* note 215.

<sup>221</sup>432 N.E.2d 46 (Ind. Ct. App. 1982).

<sup>222</sup>See *Swanson v. Shroat*, 169 Ind. App. 80, 345 N.E.2d 872 (1976), *cited in* 432 N.E.2d at 47.

<sup>223</sup>432 N.E.2d at 49 (Ratliff, J., dissenting).

<sup>224</sup>*Id.* at 50.

<sup>225</sup>*Id.* at 49.

years ago and which seems to be the driving policy of the Indiana Supreme Court. The dissent viewed the obligation of the defendant as requiring *positive* wrongful acts, willfull or wanton misconduct, and entrapment, but not reasonable care.<sup>226</sup> The dissent also made it clear that a plaintiff must look out for his own safety and that a guest has no right to any protection from *obvious* dangers.<sup>227</sup> The *Shea* dissent comes close to approving the active-passive distinction of negligence law which has been specifically rejected in other Indiana negligence cases.<sup>228</sup>

Although the *Shea* majority analyzed the case as requiring reasonable care because the condition of the premises involved was not the source of the breach of duty, the time has come for Indiana to reject the ancient premises liability categories.

7. *Parent-Child Immunity*.—In *Buffalo v. Buffalo*,<sup>229</sup> the court reversed the dismissal of a complaint by a child against his non-custodial parent when the marriage of the child's parents had been previously dissolved.<sup>230</sup> The *Buffalo* court implied that the parent-child immunity doctrine stood intact,<sup>231</sup> but that the circumstances of this case were outside the doctrine.<sup>232</sup> Although the decision in *Buffalo* seems quite appropriate, the suggestion by the court, that their knowledge of present day social life would substantiate the continuance of the parent-child immunity,<sup>233</sup> does not seem to comport with the fact that other similar immunities have been abrogated.<sup>234</sup> In addition, current conditions indicate that children may need protection, considering the increase of both physical and mental abuse of children by an increasing number of parents.<sup>235</sup>

8. *Negligent Infliction of Emotional Harm*.—In *Little v. Williamson*,<sup>236</sup> a young child saw his sister mauled by a great Dane dog owned by the defendants. The plaintiff and his sister were walking in the neighborhood when the great Dane grabbed a puppy from the girl's arms and killed the puppy. In the process the great Dane bit so hard on the girl's arm that he broke two of the bones in her arm and caused

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<sup>226</sup>*Id.* at 50 (Ratliff, J., dissenting) (citing Fort Wayne Nat'l Bank v. Doctor, 149 Ind. Ct. App. 365, 272 N.E.2d 876 (1971)).

<sup>227</sup>432 N.E.2d at 51 (Ratliff, J., dissenting) (citing Swanson v. Shroat, 169 Ind. App. 80, 345 N.E.2d 872 (1976)).

<sup>228</sup>*See, e.g.,* Fort Wayne Nat'l Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971).

<sup>229</sup>441 N.E.2d 711 (Ind. Ct. App. 1982).

<sup>230</sup>*Id.* at 712.

<sup>231</sup>*Id.* at 712-13.

<sup>232</sup>*Id.* at 713.

<sup>233</sup>*Id.* at 712 (quoting Smith v. Smith, 81 Ind. App. 566, 569-70, 142 N.E. 128, 129 (1924)).

<sup>234</sup>*See* Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972) (interspousal immunity abrogated).

<sup>235</sup>*See* Davidson, *Children's Rights: Emerging Trends for the 1980's*, 19 TRIAL 44, 46 (1983).

<sup>236</sup>441 N.E.2d 974 (Ind. Ct. App. 1982).

numerous lacerations. The plaintiff was present during the mauling of his sister and suffered mental anguish and fear as a result. The trial court granted summary judgment for the defendants and the court of appeals affirmed.<sup>237</sup> The *Little* court confirmed the Indiana rule that some type of physical impact is required in both negligent and intentional infliction of emotional distress cases.<sup>238</sup> The impact rule as espoused in Indiana seems unnecessary to say the least. The major reason for continuance of the rules seems to be based upon the idea that it will prevent fraudulent claims and the release of the dreaded "flood of fictitious claims" upon the courts.<sup>239</sup>

Under the circumstances of the *Little* case, it seems almost inevitable that a plaintiff would suffer mental anguish and fear, in fact, it would be unusual if he did not. The fear of fraudulent claims as a support for the impact rule ignores the advances in modern medicine and psychiatry and the fact that mental damages are quite common in negligence cases involving physical injury. In addition, the courts appear capable of protecting parties against any fraudulent claims that might arise. The reason for the existence of the courts is to adjudicate the claims of parties, and to deny parties' claims because "we're too busy" does not seem to be a principled rationale. The courts in this area may, in reality, be implementing the policy consideration underlying other areas of Indiana law, i.e., the protection of insurance companies.<sup>240</sup>

9. *Guest Cases*.—Indiana still adheres to its guest statute<sup>241</sup> on the shaky grounds of social politeness and gratitude toward one giving a gratuitous ride to another. This policy has been grounded upon the promotion of hospitality.<sup>242</sup> If this is the true foundation of guest cases, the Supreme Court of Indiana and the Indiana Legislature must believe that the promotion of politeness is of much greater importance than the compensation of victims or the promotion of safety.

Within the framework of the guest statute, the plaintiff is required

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<sup>237</sup>*Id.* at 974.

<sup>238</sup>*Id.* at 975 (citing *Kaletha v. Bartz Elevator Co.*, 178 Ind. App. 654, 383 N.E.2d 1071 (1978) (intentional); *Kroger Co. v. Beck*, 176 Ind. App. 202, 375 N.E.2d 640 (1978) (negligent); *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 357 N.E.2d 247 (1976) (negligent)). Although the *Little* court noted an exception to the impact rule in certain cases of intentional infliction of emotional distress, 441 N.E.2d at 975 (citing *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 327, 357 N.E.2d 247, 254 (1976)), the court stated that responsibility for recognizing negligent infliction of emotional distress as a tort independent of physical impact lay with the Indiana Supreme Court or the state legislature, and that any erosion of the impact rule must first occur in cases of intentional rather than negligent infliction of emotional distress. 441 N.E.2d at 975.

<sup>239</sup>See *Charlie Stuart Oldsmobile, Inc. v. Smith*, 171 Ind. App. 315, 325, 357 N.E.2d 247, 253 (1976).

<sup>240</sup>See *supra* notes 1-13 and accompanying text.

<sup>241</sup>See IND. CODE §§ 9-3-3-1 to -2 (1982).

<sup>242</sup>See *Sidle v. Majors*, 264 Ind. 206, 216, 341 N.E.2d 763, 771 (1976).

to show some type of behavior by the defendant-driver beyond mere negligence, usually referred to as willful and wanton conduct.<sup>243</sup> This type of conduct was discussed in *Thrapp v. Austin*.<sup>244</sup> In *Thrapp*, the plaintiff was injured in a one car accident and the identity of the driver was in dispute. The *Thrapp* court stated that inferences were sufficient to support the conclusion that the defendant was the driver of the vehicle.<sup>245</sup> The court also discussed the evidentiary requirements for willful and wanton conduct<sup>246</sup> and concluded that whenever intoxication is combined with evidence of other types of misconduct, willful and wanton conduct may be inferred.<sup>247</sup> In *Thrapp*, the evidence showing that the driver was intoxicated—the car went off both sides of the road several times and the guest-passenger requested to drive—was sufficient to establish willful and wanton conduct.<sup>248</sup>

In *Clipp v. Weaver*,<sup>249</sup> Gerald Clipp was killed in a boat accident wherein he was riding as a passenger, and an action was brought for his death. The trial court granted summary judgment for the defendant and the plaintiff appealed. The court of appeals reversed the trial court's summary judgment,<sup>250</sup> stating that the standard of care owed by the operator of a boat to his passenger is one of ordinary care, and the plaintiff need not prove willful and wanton misconduct.<sup>251</sup> The *Weaver* court rejected

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<sup>243</sup>See IND. CODE § 9-3-3-1 (1982).

<sup>244</sup>436 N.E.2d 1170 (Ind. Ct. App. 1982); see also *Antcliff v. Datzman*, 436 N.E.2d 114 (Ind. Ct. App. 1982), discussed *infra* at notes 332-37 and accompanying text.

<sup>245</sup>436 N.E.2d at 1174.

<sup>246</sup>Wanton or willful misconduct requires that [sic] the host-driver to be: (1) conscious of his misconduct; (2) motivated by reckless indifference for the safety of his guest; and (3) to know his conduct subjects his guests to a probability of injury. The trial court should also apply the following guidelines: a) An error of judgment or a mistake standing alone, on the part of the host, will not amount to wanton or willful misconduct. b) The host must have manifested an attitude adverse to the guest, or of perverseness, in that the host must have been shown he was indifferent to the consequences of his conduct. c) The entire course of conduct of the host leading up to the accident must be considered. d) The host must have had actual knowledge of danger confronting the guest.

*Id.* at 1175 (citations omitted).

<sup>247</sup>*Id.* at 1174 (citing *Andert v. Fuchs*, 271 Ind. 627, 394 N.E.2d 931 (1979)).

<sup>248</sup>*Id.* at 1175.

<sup>249</sup>439 N.E.2d 1189 (Ind. Ct. App. 1982), *vacated*, 451 N.E.2d 1092 (Ind. 1983). The Indiana Supreme Court granted transfer and vacated the court of appeals opinion because it conflicted with the Seventh Circuit Court of Appeals decision in *McDonnell v. Flaherty*, 636 F.2d 184 (7th Cir. 1980) (applying Indiana law). Nevertheless, the supreme court stated: "[W]e have carefully examined Judge Conover's excellent opinion [for the Indiana Court of Appeals] and believe he is absolutely correct in his approach to the law regarding the operation of watercraft." 451 N.E.2d at 1092. Because the supreme court took the same approach and added little to the court of appeals analysis, only the court of appeals decision will be discussed in this Survey Article.

<sup>250</sup>*Id.* at 1190.

<sup>251</sup>*Id.* at 1193.

the application of the guest case rationale because the Indiana motor vehicle guest statute applies only to motor vehicles operated on public highways.<sup>252</sup> In addition, the court rejected the application of a prior decision by the United States Court of Appeals for the Seventh Circuit,<sup>253</sup> which interpreted boat cases as requiring proof of willful and wanton negligence based upon the rationale of the duty owed to social guests in premises liability cases.<sup>254</sup> Noting that Indiana Code section 14-1-1-16,<sup>255</sup> regarding the standard of care owed by boat owners, only requires proof of ordinary negligence, the majority in *Weaver* reversed;<sup>256</sup> however, Presiding Judge Young stated in dissent that he would require the willful and wanton rule in order to promote hospitality.<sup>257</sup>

The *Weaver* decision, although rejecting the troglodytic concept of the guest rationale, emphasizes the sluggish state of Indiana law. Indiana is practically the last jurisdiction in the nation still clinging to the motor vehicle guest rationale,<sup>258</sup> based upon the insupportable policy of the promotion of hospitality. Is it really ingratitude to bring an action against a driver whose negligent act has caused injury to one or more of his passengers?

### *E. Res Ipsa Loquitur*

The doctrine of *res ipsa loquitur* is a rule of evidence that allows an inference of negligence once the following elements have been fulfilled:

- "1) [T]he event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

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<sup>252</sup>*Id.* at 1190 (citing IND. CODE § 9-1-1-2(a), (b), (q) (1982)). Applying the rule of statutory construction that "the more specific statute will govern if in apparent conflict with a more general statute," 439 N.E.2d at 1191, the court held that IND. CODE § 14-1-1-1 (1982), which specifically defines boats, excludes boats from the provision of the motor vehicle guest statute, IND. CODE § 9-3-3-1 (1982). 439 N.E.2d at 1191.

<sup>253</sup>*McDonnell v. Flaharty*, 636 F.2d 184 (7th Cir. 1980), *distinguished in* 439 N.E.2d at 1192.

<sup>254</sup>636 F.2d at 186-87.

<sup>255</sup>IND. CODE § 14-1-1-16 (1982), *quoted in* 439 N.E.2d at 1193.

<sup>256</sup>IND. CODE § 14-1-1-16 (1982) provides: "Every person operating any boat shall operate the same in a careful and prudent manner, having due regard for the rights, safety and property of other persons . . . ." The *Weaver* court held that the words "careful and prudent manner" determined the degree of care required of a boat operator, and that "Indiana cases using these words apply only to the standard of reasonable and ordinary care." 439 N.E.2d at 1193 (citing *Orth v. Smedley*, 177 Ind. App. 90, 378 N.E.2d 20 (1978); *Allied Fidelity Ins. Co. v. Lamb*, 361 N.E.2d 174 (Ind. Ct. App. 1977)). Further, the *Weaver* court found the words "other persons" to be broad enough to include gratuitous guests. 439 N.E.2d at 1193.

<sup>257</sup>439 N.E.2d at 1193 (Young, J., dissenting).

<sup>258</sup>Only Indiana, Alabama, Arkansas, Delaware, Georgia, and Utah still have guest statutes that prevent a guest-passenger from bringing an action against a host-automobile driver based on ordinary negligence. Townsend, *supra* note 141, at 4.

- 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
- 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff".<sup>259</sup>

Two recent Indiana Court of Appeals cases, *SCM Corp. v. Letterer*<sup>260</sup> and *Bituminous Fire & Marine Insurance Co. v. Culligan Fyrprotexion, Inc.*,<sup>261</sup> discussed the application of the second element above. Both cases stated that Indiana requires that the defendant have exclusive control of the injuring agency at the *time the accident occurs*.<sup>262</sup> It does not require a great deal of thought to conclude that the control element of *res ipsa*, if restricted to the time of the accident, would eliminate its applicability to many factual situations, such as defective products. If the defect originated at the time of manufacture, the product will be sold and the accident will occur at a later time, usually when the product is in the control of the user or someone other than the defendant-manufacturer.

The primary source of the control rule in Indiana seems to be the 1958 case of *Evansville American Legion Home Association v. White*,<sup>263</sup> wherein an unfortunate plaintiff fell on an allegedly defective chair owned by the defendant. The injured plaintiff was denied recovery because at the time she sat in the chair, she had control of the injuring agency.<sup>264</sup> Both *Letterer*<sup>265</sup> and *Bituminous*<sup>266</sup> cite the *White* decision, along with other cases, most of which rely on *White*.<sup>267</sup> It is also noteworthy that Prosser, upon which *Letterer* relies for the elements of *res ipsa*,<sup>268</sup> commented that the literal application of the second element has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury—as in the . . . case denying recovery where a customer in a store sat down on a chair, which collapsed."<sup>269</sup>

Thus, the key Indiana case, *White*, does not seem to be within the logic for which *res ipsa* was intended, according to one of the leading authorities on tort law. As long ago as 1944, one of the more prominent cases

<sup>259</sup>*SCM Corp. v. Letterer*, 448 N.E.2d 686, 689 (Ind. Ct. App. 1983) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 39, at 214 (4th ed. 1971)).

<sup>260</sup>448 N.E.2d 686 (Ind. Ct. App. 1983).

<sup>261</sup>437 N.E.2d 1360 (Ind. Ct. App. 1982).

<sup>262</sup>448 N.E.2d at 689; 437 N.E.2d at 1365.

<sup>263</sup>239 Ind. 138, 154 N.E.2d 109 (1958).

<sup>264</sup>*Id.* at 140, 154 N.E.2d at 110.

<sup>265</sup>*See* 448 N.E.2d at 689.

<sup>266</sup>*See* 437 N.E.2d at 1365.

<sup>267</sup>*See, e.g.,* *Henley v. Nu-Gas Co.*, 149 Ind. App. 307, 271 N.E.2d 741 (1971), *cited in* 448 N.E.2d at 689 *and* 437 N.E.2d at 1365.

<sup>268</sup>*See* 448 N.E.2d at 689 (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 39, at 214 (4th ed. 1971); *see supra* text accompanying note 259).

<sup>269</sup>W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 39, at 220 (4th ed. 1971) (citing *Kilgore v. Shepard Co.*, 52 R.I. 151, 158 A. 720 (1932)).



in the country stated that the defendant's control at the time of *the indicated negligence* should be sufficient to satisfy the control requirement.<sup>270</sup> The *Letterer* case, in recognizing the applicability of *res ipsa* in strict liability cases, attempted to alleviate the harshness of the control element.<sup>271</sup> The "ridiculous conclusions" will remain in negligence cases, however, if Indiana continues to adhere to the unwarranted literal interpretation of the control doctrine. It seems unduly harsh that merely because the plaintiff has possession or control of the injuring agency at the moment of the accident, he should be deprived of the inferences raised by the *res ipsa* doctrine, especially when, as it often happens, the plaintiff is unable to meet the proof requirements of negligence, because the damning evidence thereof is in the control of the defendant.

In *Hammond v. Scot Lad Foods, Inc.*,<sup>272</sup> the court emphasized that a jury instruction on *res ipsa* *must* include an instruction on the inferences which are to be drawn from the proof of the three elements of *res ipsa*.<sup>273</sup> In the context of Indiana's pattern jury instructions, the *Hammond* court held that instruction No. 7.11, setting forth the three elements of *res ipsa*, must be accompanied by instruction No. 7.13, which describes the inferences resulting from meeting the elements.<sup>274</sup>

In *Marquis v. Battersby*,<sup>275</sup> the court discussed the first element of *res ipsa*—the type of accident which does not ordinarily occur in the absence of someone's negligence—and found the doctrine inapplicable where the incident in question was of a nature not within the ordinary knowledge of a jury.<sup>276</sup> Thus, in medical malpractice cases, or other negligence cases where the standard of care must be established by expert testimony, *res ipsa* is inapplicable. However, in a medical negligence case where the consequence of the alleged negligent treatment is within the common knowledge of laymen, such as leaving a sponge in the body of the plaintiff, *res ipsa* should be applicable.

## F. Damages

### 1. Treble Damages for Wrongful Cutting of Timber.—In *Wright v.*

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<sup>270</sup>*Escola v. Coca Cola Bottling Works*, 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944).

<sup>271</sup>448 N.E.2d at 690.

<sup>272</sup>436 N.E.2d 362 (Ind. Ct. App. 1982).

<sup>273</sup>*Id.* at 364. The emphasis of this holding is heightened by the fact that the court of appeals took the unusual action of upholding the trial court on grounds not asserted by either party in their appellate briefs. *See id.* at 364-65. The court stated that it took such action, *sua sponte*, because the instruction, which was requested by the plaintiff and rejected by the trial court, and which did not tell the jury what inferences would be raised by the application of *res ipsa* in this case, was " 'palpably bad on its face, and' . . . to approve that instruction by itself could only have the effect of 'confusing the law and misleading the profession.' " *Id.* at 365 (quoting *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 99, 41 N.E.2d 195, 196 (1942) (Shake, C.J., on petition for rehearing)).

<sup>274</sup>436 N.E.2d at 365.

<sup>275</sup>443 N.E.2d 1202 (Ind. Ct. App. 1982).

<sup>276</sup>*Id.* at 1203.

*Reuss*,<sup>277</sup> the plaintiff received treble damages under Indiana Code section 25-36.5-1-17<sup>278</sup> in addition to other damages for the wrongful cutting and removal of trees from the plaintiff's land. The court of appeals affirmed the judgment of the trial court<sup>279</sup> and determined that the treble damages statute was one of strict liability which did not require intentional or willful conduct.<sup>280</sup> Thus, under section 25-36.5-1-17, lack of intent, good faith, and mistake of fact are not defenses, and the criminal mens rea is not required in order for the plaintiff to recover.

2. *Reduction of Damages Reversed*.—In *Weaver v. Gullion*,<sup>281</sup> an action for injuries received in an auto collision, the trial court reduced a judgment for one of the plaintiffs from \$27,000 to \$3,000. The court of appeals affirmed the trial court's action,<sup>282</sup> but on transfer, the Indiana Supreme Court reversed and reinstated the original \$27,000 verdict in favor of the plaintiff.<sup>283</sup> The supreme court noted that the primary concern of the trial court was the weakness of the plaintiff's medical evidence concerning permanent injuries.<sup>284</sup> The supreme court also noted that it was uncontroverted that during a temporary period of four and one-half months the plaintiff had suffered severe anxiety, pain, disability and expensive medical treatment, which amply supported the \$27,000 verdict.<sup>285</sup>

3. *Conflicts, Aggravation of Pre-existing Condition, and Survivorship*.—In *Lee v. Lincoln National Bank & Trust Co.*,<sup>286</sup> residents of Michigan and Indiana were involved in an automobile accident in Indiana. One of the Michigan residents subsequently died and was represented by the administrator of his estate in an action brought by the surviving Michigan residents. The defendants argued that the Michigan No Fault Insurance Act<sup>287</sup> precluded any tort action in Indiana, but the trial court denied defendants' summary judgment motion. On interlocutory appeal, the Indiana Court of Appeals agreed with the trial court and stated that the doctrine of *lex loci delicti commissi* applied<sup>288</sup> and, therefore, Indiana law allowed such an action, and the defendants' motion for summary judgment was properly denied.

The defendants also contended that, because the death certificate indicated that the plaintiffs' decedent died from a pulmonary embolism resulting from a pre-existing condition and not from injuries resulting from

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<sup>277</sup>434 N.E.2d 925 (Ind. Ct. App. 1982).

<sup>278</sup>See IND. CODE § 25-36.5-1-17 (1982).

<sup>279</sup>434 N.E.2d at 926.

<sup>280</sup>*Id.* at 929.

<sup>281</sup>446 N.E.2d 605 (Ind. 1983).

<sup>282</sup>See *id.* at 606.

<sup>283</sup>*Id.*

<sup>284</sup>*Id.* at 607.

<sup>285</sup>*Id.*

<sup>286</sup>442 N.E.2d 1147 (Ind. Ct. App. 1982).

<sup>287</sup>See MICH. COMP. LAWS ANN. §§ 500.3101 - .3179 (West 1983).

<sup>288</sup>442 N.E.2d at 1148. This doctrine states that "the law of the location of the tort is applicable in a tort action for recovery of damages." *Id.*

the automobile accident, the plaintiffs could not recover damages. The *Lee* court, however, referred to the deposition of a medical expert that made it clear that the injuries from the accident could have aggravated a pre-existing condition and, as such, it was up to the jury to determine the cause of death in the wrongful death action.<sup>289</sup>

Finally, the defendants argued that the Indiana survivor's statute<sup>290</sup> limited plaintiffs' damages. The *Lee* court, however, noting that the survivor's statute only limited damages when the plaintiff died from injuries other than those received at the hands of the defendant, affirmed the denial of the defendants' summary judgment motion, because a jury question still remained as to the cause of death of the plaintiffs' decedent.<sup>291</sup>

4. *Recovery of Wrongful Death Damages by Illegitimate Children.*—The damages that are allowed under the Indiana Wrongful Death Statute<sup>292</sup> may be recovered by legitimate "dependent children,"<sup>293</sup> but the statute is silent in regard to whether illegitimate children are, or can be, "dependent children." Special problems arise under Indiana's statutory scheme regarding the relationship between an illegitimate child and his or her putative father.<sup>294</sup> In *S.M.V. v. Littlepage*,<sup>295</sup> the court was confronted with the claim of a posthumously born illegitimate child for a distributive share of the proceeds of a wrongful death settlement obtained by the deceased putative father's surviving legitimate child. The court concluded that "dependent children," as used in the Wrongful Death Act, includes "any illegitimate child who has the right to maintain a claim for inheritance against his father's estate under the laws of intestate succession, or to enforce parental obligations under the paternity statute against the father's estate."<sup>296</sup> Thus, under *Littlepage*, for an illegitimate child to successfully

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<sup>289</sup>442 N.E.2d at 1148-49.

<sup>290</sup>See IND. CODE § 34-1-1-1 (1982), which states in relevant part:

[W]hen a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from *causes other than* said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages resulting from such injuries, if the person so injured might have maintained such action, had he or she lived; but provided further, that the personal representative of said injured person shall be permitted to recovery only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death.

*Id.* (emphasis added).

<sup>291</sup>442 N.E.2d at 1150.

<sup>292</sup>IND. CODE §§ 34-1-1-1 to -8 (1982).

<sup>293</sup>See *id.* § 34-1-1-2.

<sup>294</sup>See *infra* note 296.

<sup>295</sup>443 N.E.2d 103 (Ind. Ct. App. 1982).

<sup>296</sup>*Id.* at 110. Indiana law governing inheritance to, through, and from illegitimate children is codified at IND. CODE § 29-1-2-7 (1982). Subsection 7(b) states that, for inheritance purposes, an illegitimate child is to be treated the same as if he were the legitimate child of his father if and only if: "(1) the paternity of such child has been established by law, during

claim damages for the wrongful death of his or her putative father, facts must be available that indicate: (1) paternity of the decedent was established during his lifetime by a court having jurisdiction; or (2) the child's mother and putative father married *and* the father acknowledged the paternity of the child; or (3) the father acknowledged paternity in writing; or (4) the father performed his support obligations, in whole or in part, in the past.<sup>297</sup> The *Littlepage* court indicated its belief that the above requirements would strike a reasonable balance between the prevention of spurious claims, problems of proof of paternity, and the rights of illegitimate children.<sup>298</sup> The court affirmed the trial court's summary judgment against the plaintiff on the basis that the child failed to meet any of the required proofs of paternity.<sup>299</sup>

Judge Ratliff, in a concurring opinion in *Littlepage*, questioned the continued validity of the concerns of the court in reference to the problems created by stale claims of paternity, the difficulty of proving paternity, and the dangers of spurious claims as justifications for the statutes governing the rights of illegitimate children.<sup>300</sup> Judge Ratliff pointed out that recent court decisions,<sup>301</sup> scientific knowledge, and the Indiana legislature's extension of the statute of limitations in paternity actions<sup>302</sup>

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the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledged the child to be his own." *Id.* at § -7(b).

At all times relevant to the *Littlepage* case, Indiana paternity law was governed by IND. CODE §§ 31-4-1-1 to -33 (1976) (repealed 1978). Section 7 of the now-repealed statute allowed the obligation of the father of an illegitimate child to be enforced against the father's estate "where his paternity has been established during his lifetime by judgment of a court of competent jurisdiction, or where his paternity has been acknowledged by him in writing, or by the part performance of his obligations." *Id.* § -7. It appears that the *Littlepage* holding is limited to the legislative scheme expressed in the 1976 statute. *See* 443 N.E.2d at 107 (noting that "[a]t all times relevant to the case at bar, Indiana's paternity statute was IND. CODE § 31-4-1-1 [1976]"); *see also* 443 N.E.2d at 110 (stating that its definition of "dependent children" is a "reasonable and proper interpretation of the legislative scheme involved here") (emphasis added); *id.* at 111 (Ratliff, J., concurring) ("I view the majority's comments concerning former legislative policy to have been offered for historical background . . .").

Indiana's present paternity law is codified at IND. CODE §§ 31-6-6.1-1 to -19 (1982). Especially relevant here are sections 6, 8, and 9.

<sup>297</sup>*See* 443 N.E.2d at 110; *see also supra* note 296. As discussed *supra* in note 296, it appears that the *Littlepage* holding is limited to the law as it existed at the times relevant to that case.

<sup>298</sup>*See* 443 N.E.2d at 109-10.

<sup>299</sup>*Id.* at 110.

<sup>300</sup>*Id.* at 110-11 (Ratliff, J., concurring).

<sup>301</sup>*See, e.g.,* *Mills v. Habluetzel*, 456 U.S. 91 (1982) (declaring a Texas one-year statute of limitations in paternity actions unconstitutional); *Little v. Streater*, 452 U.S. 1 (1981) (holding denial of blood grouping test to indigent paternity defendant a denial of due process); *In re M.D.H.*, 437 N.E.2d 119 (Ind. Ct. App. 1982) (declaring former Indiana two-year statute of limitations in paternity actions unconstitutional).

<sup>302</sup>*Compare* IND. CODE § 31-4-1-26 (1976) (repealed 1978) *with* IND. CODE § 31-6-6.1 (1982).

had negated to a great extent the court's continued reliance upon antiquated concepts.<sup>303</sup>

In *Hollingsworth v. Taylor*,<sup>304</sup> the court applied the doctrines of *Littlepage* and held that an illegitimate child had met the requirements for "dependent child" within the meaning of the Wrongful Death Statute, inasmuch as the deceased putative father had supported the child and had acknowledged the child as his own in writing.<sup>305</sup>

5. *Permanent and Non-Permanent Injury to Real Property*.—In *Capitol Builders, Inc. v. Shipley*,<sup>306</sup> an action for negligence and breach of warranty in the construction of a home, the court concluded that permanent injury to realty exists when "the cost of restoration exceeds the market value of the building prior to injury."<sup>307</sup> Conversely, an injury to real property is "non-permanent," the court held, when the cost of restoration is less than the pre-injury market value of the building.<sup>308</sup> If the injury to the realty is non-permanent, then the measure of damages is the cost of restoration or repair.<sup>309</sup>

6. *Economic Loss*.—In *Babson Brothers v. Tipstar Corp.*,<sup>310</sup> the plaintiff sued the defendant for negligent installation of a milking parlor. A jury verdict was rendered in favor of the plaintiff, and on appeal, the defendant alleged that the trial court erred by allowing the jury to consider evidence of the plaintiff's economic losses. The court of appeals noted that contractual damages, such as reliance interest or benefit of the bargain, are generally not recoverable in a tort action.<sup>311</sup> The *Tipstar* court, however, agreed with the plaintiff that Indiana law recognizes the recovery of lost profits in a tort action<sup>312</sup> and that, in some situations, economic losses may be characterized as consequential or compensatory damages.<sup>313</sup> In such situations, recovery may be allowed in a tort action.

7. *Punitive Damages*.—Indiana has allowed punitive damages in a variety of situations where the defendant's conduct manifests elements

<sup>303</sup>443 N.E.2d at 110-11 (Ratliff, J., concurring).

<sup>304</sup>442 N.E.2d 1150 (Ind. Ct. App. 1982).

<sup>305</sup>*Id.* at 1152. Like *Littlepage*, it appears that *Hollingsworth* was also decided under IND. CODE § 31-3-1-7 (1976) (repealed 1978). See 442 N.E.2d at 1152; see also, *supra* note 296. For a further discussion of these cases, see Falender, *Trusts and Decedents' Estates*, 1983 *Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 387, 387 (1984).

<sup>306</sup>439 N.E.2d 217 (Ind. Ct. App. 1982).

<sup>307</sup>*Id.* at 226 (quoting *General Outdoor Advertising Co. v. LaSalle Realty Corp.*, 141 Ind. App. 247, 267, 218 N.E.2d 141, 151 (1966)).

<sup>308</sup>439 N.E.2d at 226.

<sup>309</sup>*Id.*

<sup>310</sup>446 N.E.2d 11 (Ind. Ct. App. 1983).

<sup>311</sup>*Id.* at 15 (citing *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982)).

<sup>312</sup>446 N.E.2d at 15 (citing *Indiana Bell Co. v. O'Bryan*, 408 N.E.2d 178 (Ind. Ct. App. 1980); *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004 (1978)).

<sup>313</sup>446 N.E.2d at 15.

of fraud, malice, gross negligence, or oppression.<sup>314</sup> In *Travelers Indemnity Co. v. Armstrong*,<sup>315</sup> however, the Indiana Supreme Court, required that the plaintiff prove his case for punitive damages by clear and convincing evidence.<sup>316</sup>

The *Armstrong* opinion, as common law in Indiana, generally has both retrospective as well as prospective effect, as was demonstrated in *Don Medow Motors, Inc. v. Grauman*.<sup>317</sup> There, the plaintiff received a jury verdict and judgment for damages, including \$17,500 in punitive damages. The *Grauman* court affirmed certain statutory damages<sup>318</sup> and compensatory damages for breach of warranty<sup>319</sup> but remanded the case

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<sup>314</sup>See, e.g., *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977); *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976); *Jos. Schlitz Brewing Co. v. Central Beverage Co.*, 172 Ind. App. 81, 359 N.E.2d 566 (1977).

<sup>315</sup>442 N.E.2d 349 (Ind. 1982).

<sup>316</sup>*Id.* at 365. After noting that there is no right to punitive damages, *id.* at 362 (citing *Indianapolis Bleaching Co. v. McMillan*, 64 Ind. App. 268, 113 N.E. 1019 (1917)), the *Armstrong* court proceeded to outline its rationale for the stricter burden of proof for recovery of punitive damages:

It cannot be said, therefore, that a plaintiff seeking such a bonus is denied any right, if he be held to a degree of proof higher than is required in other actions. In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing. For, just as we agree that it is better to acquit a person guilty of a crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error.

. . .  
. . . . .

A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract—which may be nothing more than a refusal to pay the amount demanded and subsequently found to be owing—injects such risks into refusing and defending against questionable claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes.

442 N.E.2d at 362-63. For a further discussion of this case, see Arthur, *Insurance Law*, 1983 *Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 226 (1984).

<sup>317</sup>446 N.E.2d 651 (Ind. Ct. App. 1983).

<sup>318</sup>*Id.* at 653; see 15 U.S.C. § 1989(a) (1982).

<sup>319</sup>446 N.E.2d at 654.

for retrial of the punitive damages award in view of the *Armstrong* decision that clear and convincing evidence is required to prove punitive damages.<sup>320</sup>

8. *Loss of Consortium*.—In *Bender v. Peay*,<sup>321</sup> a husband attempted to bring a separate action for the loss of consortium of his injured wife *after* a judgment had been entered against his wife in an action for personal injuries. The trial court denied the defendant's motion for summary judgment and certified the issue for interlocutory appeal. The court of appeals reversed the trial court and stated that a spouse's claim of loss of consortium is derived from the claim of the injured spouse;<sup>322</sup> therefore, if the injured spouse receives an adverse judgment, no loss of consortium claim may be maintained as an independent action.<sup>323</sup> Judge Neal, in dissent, stated that the principle of collateral estoppel (issue preclusion) controls where an independent claim for loss of consortium is made after the injured spouse has received an adverse judgment.<sup>324</sup> Rejecting the derivative nature of loss of consortium, Judge Neal stated that both the personal injury and loss of consortium actions arise from separate individual injuries, and each spouse should be allowed a day in court.<sup>325</sup>

### G. Pleadings

Since 1970, Indiana has used the modern system of pleadings wherein the initiation of an action merely requires a short, plain statement of the facts and circumstances which gave rise to the plaintiff's claim. This has been commonly called "notice pleading." However, the recent case of

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<sup>320</sup>*Id.* at 655. Regarding the retrospective effect of the *Armstrong* case, the *Grauman* court stated that except where an enunciation of the common law through a judicial opinion in a civil case would impair a contract made or a vested right acquired in reliance on an earlier opinion, a change in the common law generally has retrospective as well as prospective effect:

In *theory* the law has not changed; the last judicial decision is said to have enunciated the law as it had always existed. Thus, a civil case is determined on the common law as it stands when the judgment is to be rendered and not as it stood when the suit was brought . . . . Therefore, the standard of clear and convincing proof applied to *Grauman*.

*Id.* at 654 (citations omitted).

<sup>321</sup>433 N.E.2d 788 (Ind. Ct. App. 1982).

<sup>322</sup>*Id.* at 790 (citing *Arthur v. Arthur*, 156 Ind. App. 405, 296 N.E.2d 912 (1973)).

<sup>323</sup>433 N.E.2d at 792.

<sup>324</sup>*Id.* at 792 (Neal, J., dissenting). Judge Neal stated:

The majority attempts to distinguish the *Benders*' derivative-claim argument from their collateral estoppel argument. I see no distinction. The essence of the derivative argument is that the issue of the *Benders*' liability to Mrs. Peay has been decided and cannot be litigated by her husband in a subsequent suit. This is a collateral estoppel argument. It raises the same competing policies of fairness to individual litigants and deference to prior judgments.

*Id.*

<sup>325</sup>*Id.* at 794.

*Beta Alpha Shelter of Delta Tau Delta Fraternity, Inc. v. Strain*,<sup>326</sup> has called into question the concept of notice pleading. In *Strain*, the plaintiff's original complaint alleged negligent installation of a heating and cooling system. The plaintiff later filed an amended complaint adding a count of implied warranty of habitability against all defendants. After filing the amended complaint, the plaintiff filed a trial brief that asserted that the issues to be tried included the question of negligent design of the heating and cooling system. The defendant thereafter made an oral motion in limine to exclude any evidence during trial that tended to show negligent design, which the trial court granted. Later the plaintiff requested leave to file a second amended complaint to include an allegation of negligent design, which the trial court denied. The trial court entered judgment against the plaintiff, and the plaintiff appealed.

On appeal, the plaintiff contended that its original complaint was broad enough to include allegations of design defect. The *Strain* court disagreed and said that nowhere did the complaint in any manner allude to defects in design.<sup>327</sup> The *Strain* court, following the Indiana Supreme Court's decision in *State v. Rankin*,<sup>328</sup> stated that a complaint need only state the operative facts involved in the cause of action, that the rules do not require that the complaint state all of the elements of a cause of action, and while a statement of the theory at trial is desirable, it is not required.<sup>329</sup> However, the *Strain* court *held* that, "[n]otwithstanding our supreme court's declarations in *Rankin*, . . . where the plaintiff's complaint expressly sets forth its theories and facts in support thereof, the defendant may properly rely upon them in preparing for trial."<sup>330</sup> After further examination of the pleadings, the *Strain* court affirmed the judgment against the plaintiff.<sup>331</sup>

The *Strain* decision calls into question the practice of alleging specific theories and facts in the original complaint. If a plaintiff makes an error and does not include a specific type of defect in a strict liability case or a specific act of negligence, it may prove to be detrimental. For example, if the statute of limitation runs while discovery is still proceeding and the plaintiff discovers new facts or theories that he desires to allege, he may be precluded from doing so if his complaint is narrowly worded; whereas, if the plaintiff's complaint is extremely broad, he might then come within the notice requirements and still be able to make more specific allegations at pre-trial, at trial, or both. The *Strain* decision makes sense from the defendant's view, although it may prove to be a detriment to the plaintiff who attempts to be specific at the early stages of a lawsuit but later discovers new information.

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<sup>326</sup>446 N.E.2d 626 (Ind. Ct. App. 1983).

<sup>327</sup>*Id.* at 629.

<sup>328</sup>260 Ind. 228, 294 N.E.2d 604 (1973), *cited in* 446 N.E.2d at 629.

<sup>329</sup>446 N.E.2d at 629 (citing *State v. Rankin*, 260 Ind. at 230-31, 294 N.E.2d at 606).

<sup>330</sup>446 N.E.2d at 630.

<sup>331</sup>*Id.* at 631.



### H. Contributory Negligence and Assumption of Risk

In *Antcliff v. Datzman*,<sup>332</sup> the plaintiff brought an action under the guest act.<sup>333</sup> The defendant alleged that the plaintiff incurred the risk as a matter of law. The *Datzman* court, upon examination of the incurred risk defense, stated that, in this case, the issue of incurred risk was a question of fact for the jury to decide.<sup>334</sup> The court found that the evidence presented was such that the jury could infer that the plaintiff did not appreciate the risk until it was too late to abandon his course of action.<sup>335</sup> In addition, the facts presented an issue of whether the plaintiff's actions were voluntary.<sup>336</sup> The defendant urged that the instructions the trial court tendered requiring *actual* knowledge, appreciation, and voluntariness on the plaintiff's part were in error because an objective reasonable man test should have been applied. The *Datzman* court rejected the defendant's contention and stated that a subjective analysis was proper for the incurred risk defense.<sup>337</sup>

Although well written opinions such as *Kroger Co. v. Haun*<sup>338</sup> have attempted to explain the elements of assumption of risk, the issue still seems to be misconstrued. Such misconstruction seems to indicate a basic misunderstanding of the assumption of risk and contributory negligence defenses. Assumption of risk, or incurred risk<sup>339</sup> as it is sometimes called, when reduced to its basic elements is merely the defense of consent. The elements of assumption of risk, as spelled out by Indiana law<sup>340</sup> and the Restatement of Torts,<sup>341</sup> are knowledge, understanding, appreciation, and voluntariness. If a person is said to consent to something, it is clear that he must have subjective knowledge, understanding, and appreciation of the risk; he cannot consent to an unknown or unappreciated risk. It is clear that assumption of risk requires a personalized consent on the plaintiff's part because only the person involved can be said to consent. Subjectivity is an absolute necessity in assumption of risk cases. In addition, a person must be presented with viable alternatives or he has not truly consented to anything.

On the other hand, contributory negligence involves conduct, *not* consent. Like negligence, contributory negligence involves a hypothetical stand-

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<sup>332</sup>436 N.E.2d 114 (Ind. App. 1982).

<sup>333</sup>See IND. CODE §§ 9-3-3-1- to -2 (1982).

<sup>334</sup>436 N.E.2d at 119.

<sup>335</sup>*Id.*

<sup>336</sup>*Id.* (quoting *Ridgway v. Yenny*, 223 Ind. 16, 22, 57 N.E.2d 581, 583 (1944)).

<sup>337</sup>436 N.E.2d at 120 (citing *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004 (1978)).

<sup>338</sup>177 Ind. App. 403, 379 N.E.2d 1004 (Ind. Ct. App. 1978).

<sup>339</sup>The term "assumed risk" is used in the situation where the risk arises from a contractual obligation, but otherwise does not differ from "incurred risk." See *id.* at 408 n.2, 377 N.E.2d at 1008 n.2.

<sup>340</sup>*Id.* at 410, 377 N.E.2d at 1009 (quoting *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970)).

<sup>341</sup>RESTATEMENT (SECOND) OF TORTS §§ 496C, 496D (1965).

ard of reasonableness to which all are supposed to conform. Negligence and contributory negligence are based upon objective, hypothetical standards. To inject the objective contributory negligence standard into the elements of assumption of the risk would refute the basic personalized underpinnings of consent.

The *Datzman* court also examined the defense of contributory wanton and willful misconduct; however, the court rejected this theory because there was no evidence to support its application in this case.<sup>342</sup>

### I. Malicious Prosecution

The essential elements of malicious prosecution are firmly established in Indiana law.<sup>343</sup> To support a claim for malicious prosecution, the plaintiff has the burden of proving that the defendant instituted legal action against the plaintiff with malice and without probable cause; that the legal proceedings terminated in the plaintiff's favor; and that the plaintiff sustained damages.<sup>344</sup> In four recent cases, Indiana courts have refined the requisites of a claim for malicious prosecution.

1. *Underlying Legal Action.*—The court in *Shallenberger v. Scoggins-Tomlinson, Inc.*,<sup>345</sup> discussed the requirement of legal action initiated by the defendant. The defendant in *Shallenberger* filed a written grievance with the professional standards committee of a local board of realtors. In his grievance, the defendant contended that Shallenberger had engaged in conduct violative of the Realtors' Code of Ethics. After hearings on the grievance, Shallenberger was placed on probation. Shallenberger then brought an action for wrongful civil proceedings<sup>346</sup> and the trial court entered summary judgment for the defendant.

The court on appeal agreed with the lower court that the action for wrongful civil proceedings was inappropriate.<sup>347</sup> The appellate court observed that one of the essential elements of malicious prosecution was absent in that the filing of the grievance did not constitute the initiation of legal action, because the grievance proceedings were not judicial proceedings.<sup>348</sup> The *Shallenberger* decision restricted the broad definition

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<sup>342</sup>436 N.E.2d at 120.

<sup>343</sup>See *Display Fixtures Co. v. Hatcher, Inc.*, 438 N.E.2d 26, 30 (Ind. Ct. App. 1982).

<sup>344</sup>*E.g.*, *Costello v. Mutual Hosp. Ins. Inc.*, 441 N.E.2d 506, 508 (Ind. Ct. App. 1982); *Display Fixtures Co. v. Hatcher, Inc.*, 438 N.E.2d 26, 30 (Ind. Ct. App. 1982); *Shallenberger v. Scoggins-Tomlinson, Inc.*, 439 N.E.2d 699, 704 (Ind. Ct. App. 1982).

<sup>345</sup>439 N.E.2d 699 (Ind. Ct. App. 1982).

<sup>346</sup>The wrongful initiation of a civil suit gives rise to an action for wrongful civil proceedings. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 120, at 850-56 (4th ed. 1971). An action for wrongful civil proceedings is analogous to an action for malicious prosecution. *Id.*

<sup>347</sup>439 N.E.2d at 704.

<sup>348</sup>*Id.* The court reasoned that even if the grievance proceedings constituted legal action, Shallenberger would not have a claim for malicious prosecution, because the grievance proceedings did not terminate in Shallenberger's favor. *Id.*

of "prosecution" proposed in *Peoples Bank & Trust Co. v. Stock*.<sup>349</sup> In *Stock*, any sort of judicial proceeding was recognized as a legal action out of which a claim for malicious prosecution could arise.<sup>350</sup>

2. *Malice and Probable Cause*.—Malice and absence of probable cause are other elements of malicious prosecution, and these two requisites were considered in *Display Fixtures Company v. Hatcher, Inc.*<sup>351</sup> Display Fixtures filed a mechanics lien on real estate held in trust by Mercantile National Bank. Subsequently, Display Fixtures brought an action to foreclose on the mechanics lien. Mercantile National Bank responded with a counterclaim for malicious prosecution. The trial court entered judgment in favor of Mercantile National Bank. On appeal, the lower court's judgment was affirmed on the ground that the act of filing the mechanics lien constituted malicious prosecution.<sup>352</sup> The appellate court determined that the mechanics lien was filed without probable cause. Probable cause exists when a reasonable inquiry discloses facts which would induce a reasonable, intelligent, and prudent person to bring an action.<sup>353</sup> Display Fixtures, however, made no inquiry concerning facts which would have supported the filing of a mechanics lien. Moreover, the court held that malice could be inferred from a failure to make a suitable inquiry;<sup>354</sup> therefore, the trial court's award of punitive damages was upheld.<sup>355</sup>

Probable cause was the sole issue addressed by the court in *Costello v. Mutual Hospital Insurance, Inc.*<sup>356</sup> In *Costello*, an insurer brought a subrogation action against the insured and her daughter. The insured's daughter paid the amount in question, and the suit was dismissed. Thereafter, the insured brought an action for malicious prosecution. Summary judgment was entered in favor of the insurer. The appellate court affirmed the summary judgment, holding that the insurer had probable cause to include the insured as a defendant in its suit for subrogation.<sup>357</sup> The insurer based its claim upon a subrogation clause that had not been conclusively interpreted by the courts. Because the law was unsettled, the insurer had a potential right of recovery against either the insured or her dependent. From the apparent state of facts disclosed by suitable inquiry, the court held that the insurer took reasonable action to protect its collection rights and that probable cause was present.<sup>358</sup>

3. *Successful Termination*.—As further support of a claim for malicious prosecution, the plaintiff must establish that the underlying ac-

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<sup>349</sup>392 N.E.2d 505 (Ind. Ct. App. 1979).

<sup>350</sup>*Id.* at 511.

<sup>351</sup>438 N.E.2d 26 (Ind. Ct. App. 1982).

<sup>352</sup>*Id.* at 31.

<sup>353</sup>*Id.* at 30.

<sup>354</sup>*Id.* at 30-31.

<sup>355</sup>*Id.* at 31.

<sup>356</sup>441 N.E.2d 506 (Ind. Ct. App. 1982).

<sup>357</sup>*Id.* at 509.

<sup>358</sup>*Id.*

tion brought by the defendant terminated in the plaintiff's favor. In *Mattingly v. Whelden*,<sup>359</sup> the court emphasized that a plaintiff can maintain an action for malicious prosecution only upon a showing of final disposition of the underlying cause brought by the defendant.<sup>360</sup> Mattingly commenced a malicious prosecution action, basing his complaint upon an earlier suit for replevin brought by the defendant. On the same date that Mattingly's complaint was filed, the defendant perfected a timely appeal of the underlying cause. The trial court granted summary judgment against Mattingly, ruling that "all the elements necessary for the maintenance of a malicious prosecution action [were] not present . . . ." <sup>361</sup>

The court of appeals likewise concluded that an essential element of the cause of action was not in existence.<sup>362</sup> Due to the pendency of the defendant's appeal, the underlying cause had not been finally terminated at the time Mattingly commenced his malicious prosecution action. In short, the action for malicious prosecution was premature.<sup>363</sup> The court of appeals also noted, however, that the defense of prematurity does not concern the merits of a claim and, therefore, has no *res judicata* effect.<sup>364</sup> The court remanded the cause to the trial court with instruction to correct the summary judgment to a judgment of "dismissal due to prematurity without prejudice to further action."<sup>365</sup>

### J. Conclusion

In relation to the traditional goals of tort law—the compensation of injured victims, the reduction of accidents, and the increase of safety—Indiana has taken giant strides backwards in time during this survey period. Plaintiffs are again confronted with the reemergence of the barrier of privity. The no-duty concepts of a bygone era are reemphasized in appellate opinions. The guest act still bars recovery and the archaic wrongful death statute lingers on. The open and obvious danger rule threatens to spread from products liability cases to the general area of negligence. Damages are limited or new barriers, such as the clear and convincing evidence standard for punitive damages, are constructed.

The Supreme Court of Indiana does not disguise its opinion that a primary policy of tort law should be the protection of insurance carriers. In support of its protective policy, the Indiana Supreme Court has relied upon discredited and outdated rationales such as the hospitality rationale in guest cases. If this trend continues, Indiana may become the most hospitable state in the union with the least protection for its injured victims.

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<sup>359</sup>435 N.E.2d 61 (Ind. Ct. App. 1982).

<sup>360</sup>*Id.* at 63.

<sup>361</sup>*Id.*

<sup>362</sup>*Id.*

<sup>363</sup>*Id.* (quoting from the record at 74).

<sup>364</sup>435 N.E.2d at 64 (citing *Kirkpatrick v. Stingley*, 2 Ind. 269 (1850)).

<sup>365</sup>435 N.E.2d at 64.



## XV. Trusts and Decedents' Estates

DEBRA A. FALENDER\*

Undoubtedly, the most interesting development during the survey period was the enactment of a comprehensive statute governing the disclaimer of all property interests, including interests acquired by devise or descent and interests of trust beneficiaries. This new statute will be reviewed in detail in section E. Additionally, significant recent decisions and legislation will be discussed in the following sections of this Survey: decedents' estates, inheritance taxation, trusts, and guardianships.

### A. Decedents' Estates

1. *Wrongful Death Recovery*.—In *S.M.V. v. Littlepage*<sup>1</sup> and *Hollingsworth v. Taylor*,<sup>2</sup> the issue presented was whether illegitimate children of a male victim could share the proceeds of a wrongful death action. The Indiana Wrongful Death Act provides, in pertinent part, that a wrongful death recovery shall “inure to the exclusive benefit of the widow or widower . . . and to the *dependent children*, if any, or dependent next of kin, *to be distributed in the same manner as the personal property of the deceased.*”<sup>3</sup> In thorough and well-reasoned opinions, the Indiana Court of Appeals held that an illegitimate child may be included in the class of “dependent children” of the putative father in one of two ways under this wrongful death provision.<sup>4</sup> The illegitimate child may be included if he has the right to inherit from his putative father's estate under the laws of descent and distribution<sup>5</sup> or has the right to enforce parental obligations under the paternity statute.<sup>6</sup> The court, by holding in the alter-

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<sup>1</sup>443 N.E.2d 103 (Ind. Ct. App. 1982).

<sup>2</sup>442 N.E.2d 1150 (Ind. Ct. App. 1982). *Hollingsworth* and *Littlepage* were rendered on the same day. *Littlepage* was written first, despite its citation which makes it appear to have been decided after *Hollingsworth*. The *Hollingsworth* case clearly relies on the reasoning and holding of *Littlepage*.

<sup>3</sup>IND. CODE § 34-1-1-2 (1982) (emphasis added).

<sup>4</sup>*Littlepage*, 443 N.E.2d at 110; *Hollingsworth*, 442 N.E.2d at 1152.

<sup>5</sup>IND. CODE § 29-1-2-7(b) (1982) provides that an illegitimate child is treated as the child of its father, for intestate succession purposes, only if paternity is judicially established during the father's lifetime or the father marries the mother and acknowledges the child as his own.

<sup>6</sup>The relevant paternity statute in *Littlepage* and *Hollingsworth* was IND. CODE §§ 31-4-1-1 to -33 (1976) (repealed 1978). The current paternity statute is IND. CODE §§ 31-6-6.1-1 to -19 (1982 & Supp. 1983). The current statute enumerates several circumstances in which a man is presumed to be a child's biological father. These presumptions were not statutorily defined under the prior law. See *Littlepage*, 443 N.E.2d at 108. See generally Garfield,

native, avoided choosing between the paternity statute, with significantly broad bases for establishing a parent-child relationship, and the more restrictive intestate succession provision.<sup>7</sup>

At first glance, the phrase in the wrongful death statute providing that the wrongful death recovery is "to be distributed in the same manner as the personal property of the deceased" seems to contemplate identical distribution of the wrongful death recovery and the personal property owned by the decedent at death.<sup>8</sup> Yet, under the holdings of these two cases, because the paternity statute recognizes methods to establish the parent-child relationship different from those in the inheritance statute, an illegitimate child might share the wrongful death proceeds and not share the father's intestate personal (or real) estate.<sup>9</sup> The legislature, in directing the "same manner" of distribution, could not have intended to mandate the identity of the distributees of the wrongful death proceeds and the personal property of the deceased. For example, the distributions would not be identical where the decedent was survived by dependent children, but left a will disposing of his personal estate to others. Because the "manner" of distribution was probably not intended to mandate the identity of the takers, the court's decision to define dependent children by using the paternity statute as well as the intestate succession provision is not necessarily inconsistent with the express language of the wrongful death act.

2. *Will Contests.*—In *Underhill v. Deen*,<sup>10</sup> two doctors were permitted to give expert testimony regarding the decedent's mental faculties and his inability to exercise his own will in matters pertaining to the disposition of his property. The decedent's will left the entirety of his estate to his brothers, sisters, nieces, and nephews, rather than to such natural objects of his bounty as his wife. Conflicting testimony was offered regard-

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*Domestic Relations, 1980 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 215, 254 (1980).

<sup>7</sup>Under some circumstances, an illegitimate child may recover through the paternity statute without a judicial determination or an acknowledgment by the father as required by the laws of descent and distribution. See *supra* notes 5-6. The courts' holdings were constitutionally inspired, but not constitutionally required. In *Littlepage*, the court reasoned that because a scheme precluding recovery by illegitimate children for the wrongful death of their putative fathers would violate equal protection, the wrongful death statute should be construed in favor of participation by illegitimate children. A construction choosing only one of the two statutes as the intended source for the definition of children probably would not have rendered the wrongful death provision unconstitutional. A construction choosing both statutes as alternatives, however, puts the constitutionality of the statute beyond question. 443 N.E.2d at 109.

<sup>8</sup>In *Littlepage*, when discussing this language, the court stated: "Manifest reference is thus made to the laws of intestate succession." 443 N.E.2d at 107.

<sup>9</sup>For example, a written acknowledgment of paternity is sufficient to establish a parent-child relationship under the paternity statute, IND. CODE § 31-6-6.1-9 (1982), while acknowledgment alone, even if in writing, is not sufficient under the intestate succession provision. *Id.* § 29-1-2-7(b).

<sup>10</sup>442 N.E.2d 1136 (Ind. Ct. App. 1982).

ing the decedent's soundness of mind when the will was executed.<sup>11</sup> The decedent's treating physicians gave expert opinion testimony of the decedent's senility, including testimony that he was not competent to manage his business and personal affairs.<sup>12</sup> Although neither doctor had talked with the decedent about the decedent's business and personal affairs, the doctors' conclusions of incompetence were properly admitted because they were supported by the doctors' other observations and conversations with the decedent.<sup>13</sup>

3. *Claims Against the Estate.*—The court, in *Pasley v. American Underwriters, Inc.*,<sup>14</sup> addressed the question of whether a tort claimant could bring an action against a decedent's estate when no estate had been opened and no administrator appointed.<sup>15</sup> Members, American Under-

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<sup>11</sup>*Id.* at 1138.

<sup>12</sup>*Id.* at 1139.

<sup>13</sup>*Id.* at 1140. In another will contest case, *In re Estate of Niemiec*, 435 N.E.2d 999 (Ind. Ct. App. 1982), the court of appeals reiterated the fraud exception to the general rule that a will contest is barred if it is not brought within five months after the will is offered for probate. See IND. CODE § 29-1-7-17 (1982). The contestant's failure to file a timely contest is excused if such failure was induced by a fraudulent misrepresentation of the personal representative or other proponent of the will. See also *Carrell v. Ellingwood*, 423 N.E.2d 630 (Ind. Ct. App. 1981), noted in Falender, *Decedents' Estates and Trusts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 415-18, (1983). Equity will not step in and excuse the late filing, however, if the contestant should have discovered the fraud in time to commence the action. In *Niemiec*, the court of appeals seemingly found, as a matter of law, that public notice of the opening and closing of the estate established that the contestant could have discovered the fraud in time to commence the action. Unfortunately, the facts of the case are so abbreviated that it is difficult to pinpoint the holding of the case. However, the court expressly noted that a separate complaint for damages for fraud against the personal representative individually, under Indiana Code section 29-1-1-24, was not affected by the dismissal of the untimely complaint against the estate. 435 N.E.2d at 1001 n.3. In another will contest case of the same name involving this decedent's brother, *In re Estate of Niemiec*, 435 N.E.2d 570 (Ind. Ct. App. 1982), the court considered whether the deposition of the decedent's former attorney could be taken. This case is discussed in Harvey, *Civil Procedure and Jurisdiction, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 55, 66 (1983).

<sup>14</sup>433 N.E.2d 838 (Ind. Ct. App. 1982).

<sup>15</sup>*Id.* at 840. IND. CODE § 29-1-14-1 (1982) provides, in pertinent part, for the filing of claims against a decedent's estate:

(a) All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered . . . .

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(f) Nothing in this section shall affect or prevent the enforcement of a claim for injury to person or damage to property arising out of negligence against the estate of a deceased tort-feasor within the period of the statute of limitations provided for such tort action and for the purpose of enforcing such a tort claim the estate of the tort-feasor may be opened or reopened and suit filed against



writers' insured, injured Pasley and then died instantly.<sup>16</sup> The day before the expiration of the statute of limitations period, Pasley filed a complaint against "Jimmie Members (deceased), John Doe, or Mary Doe, heirs and descendants of Jimmie Members."<sup>17</sup> The court of appeals held that Pasley did not follow the proper procedure in filing his personal injury claim against Members' estate. Pasley was required by statute to enforce the claim "against the estate of [the] deceased tort-feasor."<sup>18</sup> An estate, however, does not exist, and cannot be a party to an action, without a personal representative.<sup>19</sup> Therefore, Pasley failed to perfect his tort claim because he failed to sue Members' personal representative within the limitations period. Since no personal representative had been appointed for Members, Pasley should have opened an estate for Members and sought the appointment of a personal representative before filing his tort action.<sup>20</sup>

4. *Antenuptial Agreements.*—An antenuptial agreement provided that the husband should have a life estate in certain property of his wife, but that the husband "shall not claim any right to any other property owned by the [wife] at the time of their marriage, and shall not claim or hold any interest therein by virtue of any laws of descent or by virtue of his status as surviving widower."<sup>21</sup> The court of appeals held, in *Eagleson v. Viets*,<sup>22</sup> that the husband was entitled to the \$8500 survivor's allowance,<sup>23</sup> but only out of property acquired by the wife after the marriage.<sup>24</sup> The court noted that the allowance is unavailable to a surviving spouse who takes under a will if "it clearly appears from the will" that the provision was intended to be in lieu of the statutory allowance.<sup>25</sup> The court held, however, that the antenuptial agreement, not being executed with testamentary formalities and not being intended by the parties to be a will, was

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the special representative of the estate within the period of the statute of limitations of such tort. However, any recovery against the tort-feasor's estate shall not affect any interest in the assets of the estate unless such suit was filed within the time allowed for filing claims against the estate.

<sup>16</sup>433 N.E.2d at 839.

<sup>17</sup>*Id.*

<sup>18</sup>IND. CODE § 29-1-14-1(f) (1982). See also *id.* § 34-1-1-1.

<sup>19</sup>See, e.g., *Carr v. Schneider's Estate*, 114 Ind. App. 149, 51 N.E.2d 392 (1943).

<sup>20</sup>Pasley clearly would be an "interested person" entitled to petition for the appointment of a personal representative. See IND. CODE §§ 29-1-7-4, 29-1-1-3 (1982).

<sup>21</sup>*Eagleson v. Viets*, 443 N.E.2d 343, 345 (Ind. Ct. App. 1982).

<sup>22</sup>443 N.E.2d 343 (Ind. Ct. App. 1982).

<sup>23</sup>See IND. CODE § 29-1-4-1 (1982). The court noted that any action by a surviving spouse to obtain a survivor's allowance is not a will contest, but is a statutory right. 443 N.E.2d at 346.

<sup>24</sup>The trial court erred in ordering payment of the \$8500 allowance without conducting a hearing to determine if there was sufficient after-acquired property to pay part or all of the allowance. 443 N.E.2d at 346-47.

<sup>25</sup>*Id.* at 346 (quoting IND. CODE § 29-1-3-7 (1982)). See *In re The Estate of Ringel*, 426 N.E.2d 696 (Ind. Ct. App. 1981).

not a proper source of the intention that the survivor's allowance be unavailable.<sup>26</sup>

5. *Statutory Amendments.*—Two statutory amendments enacted during the survey period are of interest in decedents' estates. Indiana Code section 29-1-7-25, regarding the probate in Indiana of a will proved or allowed in any other state or in any foreign country, was amended to provide that the foreign will "may be received and recorded in this state within three (3) years after the decedent's death."<sup>27</sup> The former statute did not expressly specify a time limit.

Indiana Code section 29-1-5-3, regarding self-proved wills, was amended by the addition of all the language after the word "following" in subsection (c) below:

(c) As an alternative to the method of execution and self-proof set out in subsections (a) and (b), a will may be executed, witnessed, and self-proved by the signatures of the testator and witnesses on a document that substantially contains the following:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the foregoing instrument declare:

- (1) that the testator executed the instrument and signified to the witnesses that the instrument is his will;
- (2) that, in the presence of both witnesses, the testator signed or acknowledged his signature already made or directed another to sign for him in his presence;
- (3) that the testator executed the will as his free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;
- (5) that the testator was of sound mind; and
- (6) that to the best of his knowledge the testator was at the time eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States or its allies.<sup>28</sup>

This new language is nearly identical to the existing language in subsection (b) of the same section.<sup>29</sup>

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<sup>26</sup>443 N.E.2d at 346.

<sup>27</sup>Act of Apr. 11, 1983, Pub. L. No. 274-1983, § 1, 1983 Ind. Acts 1752, 1752 (codified at IND. CODE § 29-1-7-25 (Supp. 1983)).

<sup>28</sup>Act of Apr. 18, 1983, Pub. L. No. 273-1983, § 1, 1983 Ind. Acts 1750, 1751 (codified at IND. CODE § 29-1-5-3(c) (Supp. 1983)).

<sup>29</sup>IND. CODE § 29-1-5-3(b) (1982) provides:

(b) An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment of the will by the testator and

The amendment to subsection (c) was, at best, an exercise in futility. No substantive change was made by the addition of the words. Both before and after the amendment, to execute an unquestionably valid self-proved will, the testator and the witnesses must sign twice. They must sign the will, and they must sign the self-proving provision, in which they declare, under penalties for perjury, that their names are signed to the foregoing instrument.<sup>30</sup> If the testator or the witnesses sign only the self-proving affidavit and not the will itself, a court *might* find that the will is not valid.<sup>31</sup> Certainly, a clearly worded statute could provide for validation of a self-proved will with only one set of signatures. Until such a statute is enacted in Indiana, however, the safest practice is to have the testator and the witnesses sign a self-proved will twice. In fact, this would be the safest practice even if a clearly worded statute were enacted in Indiana because of the possibility that a will might have to be probated in a jurisdiction without a clear statutory or judicial indication of the validity of a self-proved will without two sets of signatures.

### B. Inheritance Tax

When the settlor of a trust retains "any interests" in the trust, an inheritance tax is imposed at the settlor's death on all property subject

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the verifications of the witnesses, each made under the laws of Indiana, and evidenced by the signatures of the testator and witnesses, attached or annexed to the will in form and content substantially as follows:

UNDER PENALTIES FOR PERJURY, we, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

- (1) that the testator executed the instrument as his will;
- (2) that, in the presence of both witnesses, the testator signed or acknowledged his signature already made or directed another sign for him in his presence;
- (3) that the testator executed the will as his free and voluntary act for the purposes expressed in it;
- (4) that each of the witnesses, in the presence of the testator and of each other, signed the will as witness;
- (5) that the testator was of sound mind; and
- (6) that to the best of his knowledge the testator was at the time eighteen (18) or more years of age, or was a member of the armed forces or of the merchant marine of the United States, or its allies.

<sup>30</sup>IND. CODE § 29-1-5-3(b) and (c) (Supp. 1983).

<sup>31</sup>Cases have held, under statutes worded similarly to Indiana Code section 29-1-5-3(b) and (c), that a will or codicil is not validly executed if the witnesses merely sign the self-proving affidavit and not the will or codicil itself. *In re Estate of Mackaben*, 617 P.2d 765 (Ariz. 1980); *In re Estate of Sample*, 572 P.2d 1232 (Mont. 1977); *In re Estate of McDougal*, 552 S.W.2d 587 (Tex. Civ. App. 1977). The courts reason that unless the will is separately signed by the testator and the witnesses, there is no valid will to self-prove. *Contra In re Estate of Charry*, 359 So. 2d 544 (Fla. Dist. Ct. 1978); *In re Estate of Cutsinger*, 445 P.2d 778 (Okla. 1968) (allowing proof of attestation to be supplemented in the self-proving affidavit). This latter view is the better view, in that the testator's intent is not thwarted by what might be seen as a technicality.

to the retained interest.<sup>32</sup> In *Indiana Department of State Revenue v. Daley*,<sup>33</sup> a remote reversionary interest retained by the settlor subjected the entire corpus of an irrevocable, inter vivos trust to inheritance tax when the settlor died.<sup>34</sup> The 81-year-old settlor retained the right to "any balance remaining in the trust estate" if he survived two 60-year-old income beneficiaries.<sup>35</sup> Not surprisingly, the settlor predeceased the beneficiaries, but because of his retained reversionary interest in the trust estate, the entire corpus of the trust was taxable on the settlor's death.<sup>36</sup> The tax is imposed regardless of the remoteness of the retained interest, its uncertainty, or its lack of value.

In *Indiana Department of State Revenue v. Estate of Cohen*,<sup>37</sup> the maker of promissory notes owed to the decedent was insolvent before the decedent's death, but was a residuary beneficiary of the decedent's estate. The maker of the notes was ultimately entitled to receive from the estate more than six times the face amount of the notes. The court held that the value of promissory notes at the death of a decedent depended on their collectibility.<sup>38</sup> Since the notes in this case were collectible from the maker's distributive share of the estate,<sup>39</sup> the notes were valued at their face amount and taxed accordingly.<sup>40</sup>

In *Indiana Department of State Revenue v. Estate of Puett*,<sup>41</sup> a future interest, owned by a decedent who died in 1917, did not become possessory

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<sup>32</sup>IND. CODE § 6-4.1-2-6 (1982).

<sup>33</sup>434 N.E.2d 149 (Ind. Ct. App. 1982).

<sup>34</sup>The statute applied in the *Daley* case, IND. CODE § 6-4-1-1 (1971) (repealed 1976), has been replaced in relevant part by IND. CODE § 6-4.1-2-6 (1982); however, the language of the two provisions is identical in all respects relevant to the holding of the *Daley* court on this issue.

<sup>35</sup>434 N.E.2d at 151.

<sup>36</sup>*Id.* at 154. The trial court had erroneously concluded that the trust was subject to taxation only to the extent of the value of the settlor's retained interest, which value was about \$240. The trust corpus was valued at more than \$15,000.

An unusual feature of the trust in *Daley* was a provision that income was to be accumulated and payments to the two income beneficiaries were not to commence until 30 days after the settlor's death. The court did not decide whether this trust provision rendered the trust corpus taxable as a gratuitous transfer "intended to take effect in possession or enjoyment at or after the death of the transferor." 434 N.E.2d at 151-52. See IND. CODE § 6-4-1-1 (1971) (repealed and replaced by substantially identical language in IND. CODE § 6-4.1-2-4(a)(3) (1982)).

<sup>37</sup>436 N.E.2d 832 (Ind. Ct. App. 1982).

<sup>38</sup>*Id.* at 837.

<sup>39</sup>The court distinguished *Estate of Harper v. Commissioner of Internal Revenue*, 11 T.C. 717 (1948), in which the United States Tax Court held that the value of the obligations of a devisee-maker was the value of the assets held as security for the notes plus the net worth of the makers prior to the testator's death. The court noted that *Harper* involved federal estate tax, which is imposed on the estate property, while *Cohen* involved inheritance tax, which is imposed on the right of the heirs to succeed to property rights. 436 N.E.2d at 836.

<sup>40</sup>436 N.E.2d at 837.

<sup>41</sup>435 N.E.2d 298 (Ind. Ct. App. 1982).

until 1977.<sup>42</sup> When the interest became possessory, the decedent's estate was reopened to receive and administer it. No inheritance tax was due, however, because tax liability, if any, arose in 1917 and was barred by the ten-year statute of limitations of a 1937 inheritance tax statute.<sup>43</sup> Today, there is no statute of limitations on the imposition and collection of the inheritance tax, so that personal representatives and heirs remain personally liable until the taxes are paid.<sup>44</sup>

### C. Trusts

1. *Approval of Accounts.*—In *In re Willey Trust*,<sup>45</sup> the court of appeals for the first time clearly adopted the general rule regarding the burden of proof when a trustee seeks court approval of the trust accounts. Relying on cases dealing with beneficiaries' exceptions to an estate's accounts,<sup>46</sup> the court noted that the trustee bears the burden of proving the propriety of items in the trust account. However, if the trustee "files specific accounts and make[s] a *prima facie* showing that the accounts are proper. . . the burden of persuasion shifts to the beneficiaries to produce contradictory evidence and to show specific instances of impropriety."<sup>47</sup>

2. *Removal of Trustee.*—In *re Guardianship of Brown*<sup>48</sup> illustrates one situation where the removal of one or more trustees was justified because hostility interfered with the proper administration of the trust.<sup>49</sup> In *Brown*, the removed trustee was one of four children of the settlors of the trust. All of the children were remaindermen of the trust, and two of the children were named cotrustees. Both cotrustees had been removed by the trial court, but only one of them contested the ruling. The removal was affirmed as being in the best interests of the trust because there was evidence of lack of cooperation between the cotrustees and substantial ill will, distrust, and animosity among the four children, such that further litigation could be expected if one child remained the sole trustee of the trust.<sup>50</sup>

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<sup>42</sup>*Id.* at 299. The contingencies of survival were judicially determined in *Overpeck v. Dowd*, 173 Ind. App. 610, 364 N.E.2d 1043 (1977).

<sup>43</sup>435 N.E.2d at 302.

<sup>44</sup>See IND. CODE § 6-4.1-8-1 (1982); *Indiana Dep't of State Revenue v. Lees*, 418 N.E.2d 226 (Ind. Ct. App. 1980). Note that the 10 or 15 year catch-all provision of Indiana Code § 34-1-2-3 (Supp. 1983) might apply.

<sup>45</sup>433 N.E.2d 1191 (Ind. Ct. App. 1982).

<sup>46</sup>See *Pohlmeyer v. Second Nat'l Bank*, 118 Ind. App. 651, 81 N.E.2d 709 (1948); *Gary State Bank v. Gary State Bank*, 102 Ind. App. 342, 2 N.E.2d 814 (1936).

<sup>47</sup>433 N.E.2d at 1193-94.

<sup>48</sup>436 N.E.2d 877 (Ind. Ct. App. 1982).

<sup>49</sup>See *Massey v. St. Joseph Bank & Trust Co.*, 411 N.E.2d 751 (Ind. Ct. App. 1980) (court hinted, in dictum, that hostility between the trustee and the beneficiaries was not a per se ground for removal of the trustee).

<sup>50</sup>436 N.E.2d at 886 (citing with approval RESTATEMENT (SECOND) OF TRUSTS § 107

3. *Creation of a "Second" Trust.*—In *Grutka v. Clifford*,<sup>51</sup> the court of appeals applied secular trust law to a controversy over control of a church cemetery. Grutka, as Bishop of the Diocese, was deemed by church law to be the trustee of the cemetery. He objected to a "second," irrevocable trust purportedly created without his consent for the care of the cemetery. A majority of the court determined that a valid "second" trust may be created if "all of the beneficiaries of the initial trust . . . make a second trust of their equitable interest, or the trustee of the initial trust . . . consent[s] to the creation of a second trust."<sup>52</sup> In this case, the court found that the second trust was not created by all of the beneficiaries of the initial trust.<sup>53</sup> However, the case was remanded to determine whether the Bishop, as trustee of the initial trust, had in fact consented.<sup>54</sup>

4. *Statutory Change.*—Effective July 1, 1983, specific language was added to the Trust Code authorizing the trustee, when directed to distribute particular trust assets to two or more beneficiaries entitled to receive fractional shares in the assets, to distribute the assets without distributing a pro rata share of each asset to each beneficiary.<sup>55</sup> The trustee, however, must distribute to each beneficiary a pro rata share of the date of distribution value of the assets and must cause a fair and equitable distribution of capital gain or loss.<sup>56</sup>

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(1959) and comments thereto). The Indiana Trust Code provides for the removal of a trustee but does not state specific grounds for such removal. IND. CODE § 30-4-3-29 (1982). Thus, the court relied on the Restatement and one commentator who stated that "where there are several trustees and the relations between them are such that they cannot co-operate in the affairs of the trust, all or one of them may be removed." G. BOGERT, TRUSTS AND TRUSTEES § 527 (2d Rev. Ed. 1978).

<sup>51</sup>445 N.E.2d 1015 (Ind. Ct. App. 1983).

<sup>52</sup>*Id.* at 1020. The dissenting judge did not agree that a "second" trust may be created with the consent of the trustee. *Id.* at 1025 (Garrard, J., dissenting). Only one of the cases cited by the majority mentioned a second trust or "subtrust" created by the trustee alone, and in that case the "subtrusteeship" was not clearly conceived. *Hord v. Bradbury*, 156 Ind. 20, 27, 59 N.E. 27, 30 (1901) ("so-called subtrusteeship").

Creation of a subtrusteeship is not enumerated in the statutory powers of a trustee. IND. CODE § 30-4-3-3(a) (1982). Thus, such action is proper only if expressly authorized by the trust terms or if "necessary or appropriate for the purposes of the trust." *Id.* Further, unless the trust provides otherwise, the trustee has a duty "to take possession of and maintain control over the trust property." *Id.* § 30-4-3-6(b)(3). The trustee has a duty "not to delegate to another person the authority to perform acts which the trustee can reasonably perform personally." *Id.* § 30-4-3-6(b)(11). Thus, consent to the creation of a subtrusteeship would be an improper delegation of the trustee's duties unless expressly or impliedly authorized by the circumstances or by the trust terms.

<sup>53</sup>445 N.E.2d at 1020-21.

<sup>54</sup>*Id.* at 1025.

<sup>55</sup>Act of Apr. 4, 1983, Pub. L. No. 277-1983, § 1, 1983 Ind. Acts 1756, 1759 (codified at IND. CODE § 30-4-3-3(d) (Supp. 1983)).

<sup>56</sup>IND. CODE § 30-4-3-3(d)(1)-(2) (Supp. 1983). Additionally, the prudent man rule was changed to the prudent person rule. *Id.* § 30-4-3-3(c).

### D. Guardianships

1. *Disposition of Assets.*—Indiana Code section 29-1-18-33(c), which provides that a court may authorize gifts by a guardian on behalf of his ward under certain circumstances, was amended to take effect retroactively on January 1, 1983.<sup>57</sup> The amendments eliminated the requirement of "showing that the ward will probably remain incompetent during his lifetime," so that gifts can be authorized even if the ward does not appear to be facing a lifetime of wardship.<sup>58</sup> The amendments also expanded the powers of guardians beyond the mere making of dispositions. The court may now authorize the guardian to disclaim an interest on behalf of the ward, to waive the right of the ward to disclaim an interest, or to exercise or release a power of appointment vested in the ward.<sup>59</sup>

The prior version of Indiana Code section 29-1-18-33(c)<sup>60</sup> was construed by the court of appeals for the first time in *Boone County State*

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<sup>57</sup>Act of Apr. 13, 1983, Pub. L. No. 275-1983, 1983 Ind. Acts 1752 (codified at IND. CODE § 29-1-18-33 (Supp. 1983)).

<sup>58</sup>Act of Apr. 13, 1983, Pub. L. No. 275-1983, § 1, 1983 Ind. Acts 1752, 1753 (codified at IND. CODE § 29-1-18-33(c) (Supp. 1983)). Still, the gift can be authorized only out of such property "as the court may determine to be in excess of that likely to be required for the future care, maintenance and education of the ward . . . [or] of his dependents during the ward's lifetime." *Id.*

<sup>59</sup>IND. CODE § 29-1-18-33(c)(2)-(3) (Supp. 1983). The court is directed to determine whether the planned disposition, renunciation, disclaimer, release, or exercise is consistent with the apparent intention of the ward, which determination shall be made on the basis of evidence as to the ward's declarations, practices, or conduct or, in the absence of such evidence, upon the court's determination as to what a reasonable and prudent man would do under the same or similar circumstances as are shown by the evidence presented to the court.

*Id.* § 29-1-18-33(d). This prudent man standard was discussed in *Boone County State Bank v. Andrews*, 446 N.E.2d 618 (Ind. Ct. App. 1983).

<sup>60</sup>The previous Indiana Code section 29-1-18-33(c) provided:

(c) Upon application of the guardian or any interested party, and after such notice to all other interested persons and such other persons as the court shall direct, and upon a showing that the ward will probably remain incompetent during his lifetime, the court may, after hearing and by order, authorize the guardian to apply or dispose of such principal or income of the ward's estate as the court may determine to be in excess of that likely to be required for the future care, maintenance and education of the ward, or for the future care, maintenance and education of his dependents during the ward's lifetime, in order to effect and carry out such estate planning as the court may determine to be appropriate for the purposes of minimizing current and prospective income and estate or other taxes payable out of the principal or income of the ward's estate or by reason of the property in the ward's estate at his death, including authorization for the guardian to make gifts, outright or in trust, on behalf of the ward, to or for the benefit of prospective legatees, devisees or heirs apparent of the ward, which may include any person serving as guardian of the ward, or to other individuals or charities, as to whom or which it may be shown that the ward had an interest. In addition, the court may also authorize the guardian to apply or dispose of the excess principal or income for any other purpose the court decides is in the best interests of the ward, his estate, his spouse, or his family. In any hearing

*Bank v. Andrews*.<sup>61</sup> Nieces and nephews, who were heirs apparent of the ward, petitioned the trial court for a disposition of the ward's property for the purposes of estate planning.<sup>62</sup> The Boone County State Bank, conservator and guardian ad litem, unsuccessfully argued that nieces and nephews of the ward were not entitled to petition for a disposition to themselves. The bank asserted the statute required that the disposition be in the "best interests of the ward, his estate, his spouse, or his family,"<sup>63</sup> which language does not encompass collateral relatives.

The court noted that the "best interests" language applies only to dispositions "for reasons other than tax savings."<sup>64</sup> Initially, the statute provided that a "guardian or *any interested party*" may petition the court for a disposition of excess principal or income for the purpose of minimizing taxes.<sup>65</sup> The court held, therefore, that the nieces and nephews, as heirs apparent of the ward, were clearly "interested parties" entitled to petition for a tax-minimizing disposition.<sup>66</sup>

Indiana Code section 29-1-18-33(c)(1) currently allows disposition of "excess principal or income for any . . . purpose [other than for tax savings] the court decides is in the best interests of the ward, his estate, his spouse, or his family."<sup>67</sup> Indiana Code subsections 29-1-18-33(c)(2) and (3), providing for the disclaimer or waiver of a ward's interest and the exercise or release of a power of appointment vested in the ward, do not include language regarding the "best interests" of the ward or his direct descendants.<sup>68</sup> Thus, under the *Andrews* court's interpretation of the statute, the exercise, waiver, or release of a ward's property interest and power of appointment need not be in the "best interests" of the ward or his direct descendants.

2. *Removal of a Guardian*.—In *In re Guardianship of Brown*,<sup>69</sup> the court held that removal of a guardian was not an abuse of discretion

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upon such application, the court shall determine whether the planned disposition is consistent with the apparent intention of the ward, which determination shall be made on the basis of evidence as to the ward's declarations, practices or conduct or, in the absence of such evidence, upon the court's determination as to what a reasonable and prudent man would do under the same or similar circumstances as are shown by the evidence presented to the court.

IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>61</sup>446 N.E.2d 618 (Ind. Ct. App. 1983).

<sup>62</sup>The 98 year-old ward had assets of approximately \$900,000. The court ordered gifts of \$6,000 to each of the ward's heirs apparent.

<sup>63</sup>IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>64</sup>446 N.E.2d at 620.

<sup>65</sup>IND. CODE § 29-1-18-33(c) (1982) (emphasis added) (amended 1983). The 1983 amendments did not change this language.

<sup>66</sup>446 N.E.2d at 620. If it had been necessary, the court might also have reasonably concluded that heirs apparent are included in the phrase "best interests of the . . . [ward's] family." IND. CODE § 29-1-18-33(c) (1982) (amended 1983).

<sup>67</sup>IND. CODE § 29-1-18-33(c)(1) (Supp. 1983).

<sup>68</sup>*Id.* § 29-1-18-33(c)(2), (3).

<sup>69</sup>436 N.E.2d 877 (Ind. Ct. App. 1982).



where the guardian had deposited guardianship funds in a checking account to which a nonguardian had full access, even though no funds were diverted to nonguardianship uses.<sup>70</sup> The same guardian had, however, also virtually imprisoned the wards, his parents, by isolating them from contact with family and friends.<sup>71</sup> This imprisonment may well have been the primary basis for the court's decision.<sup>72</sup> Nevertheless, fiduciaries should heed the warning of this case and should not, even temporarily or in good faith, commingle guardianship funds.<sup>73</sup>

### E. Disclaimers

Effective July 1, 1983, the Indiana legislature enacted a comprehensive disclaimer of property interests statute,<sup>74</sup> which repealed and replaced both the Probate Code renunciation provision,<sup>75</sup> and the Trust Code disclaimer provisions.<sup>76</sup> This new chapter is intended to provide the exclusive requirements for the disclaimer of all property interests, since each disclaimer section, including a residuary-type provision covering interests

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<sup>70</sup>*Id.* at 887-88.

<sup>71</sup>*Id.* at 888.

<sup>72</sup>However, a co-guardian (another son) was also removed because of his "inability and failure to attend to the . . . medical [needs] and diets of his parents." *Id.* at 890.

<sup>73</sup>The court stated:

While no showing exists that [the guardian] was guilty of converting any of the guardianship funds for his personal use, the fact that the funds were commingled makes an accounting difficult and constitutes a breach of trust. Certainly, this manner of manipulating funds is not how a guardian should handle the assets of his wards.

*Id.* at 887.

In another guardianship case, the court of appeals decided that a guardian was not liable to another depositor for withdrawal of the ward's funds deposited in a multi-party bank account. The court reasoned that the guardian had a statutory duty to withdraw and invest those funds. *Kuehl v. Terre Haute First Nat'l Bank*, 436 N.E.2d 1160, 1163 (Ind. Ct. App. 1982). See IND. CODE §§ 29-1-18-30, -28(b) (1982); see also *id.* § 32-4-1.5-1(7) (stating that a guardian is a proper party to a multi-party account).

Also during the survey period, a probate court judgment approving the guardian's final account and discharging the guardian was held *res judicata* in a tort action by the ward to recover damages for his guardian's mismanagement, *Moxley v. Indiana Nat'l Bank*, 443 N.E.2d 374 (Ind. Ct. App. 1982), and a petition for an order to show cause why a guardian should not be removed and a petition objecting to the guardian's final report were deemed civil actions to which Trial Rule 76 governing automatic change of venue applied. *In re Goetcheus*, 446 N.E.2d 39 (Ind. Ct. App. 1983).

<sup>74</sup>Act of Apr. 11, 1983, Pub. L. No. 293-1983, § 1, 1983 Ind. Acts 1806, 1806-10 (codified at IND. CODE § 32-3-2-1 to -15 (Supp. 1983)).

<sup>75</sup>IND. CODE § 29-1-6-4 (1982) (repealed 1983).

<sup>76</sup>*Id.* §§ 30-4-2-3, -4 (1982) (repealed 1983). The trustee rejection provision of section 30-4-2-2 was left intact. See *infra* note 84 and accompanying text. Also, the power of appointment renunciation provision of section 32-3-1-1 was left intact. See *infra* note 100 and accompanying text.

that have devolved by means other than those more specifically referred to in prior sections,<sup>77</sup> provides that the “disclaimer . . . is effective only if” the requirements of that section are complied with.<sup>78</sup> This discussion will summarize the provisions of the new statute that affect decedents’ estates and trusts and will highlight some of the changes made by the statute.<sup>79</sup>

1. *Applicability of the Statute.*—The statute provides that “[a] person to whom an interest devolves by whatever means may disclaim the interest in whole or in part as provided in this chapter.”<sup>80</sup> The terms “property,”<sup>81</sup> “interest,”<sup>82</sup> and “person”<sup>83</sup> are broadly defined. The definitions clearly encompass all property interests, including, for example, the interest of a donee of a power of appointment, the interest of a taker in default of appointment, the equitable present or future interest of a trust beneficiary, the interest of a party to a multi-party bank account, the interest of the donee of a gift or of the grantee of a deed or of the promisee of a contract, the interest of a landlord or a tenant, the interest of a contract purchaser of real estate or personal property, and the interest of the beneficiary of an insurance policy or annuity contract.<sup>84</sup>

One issue that may arise, given the broad and comprehensive definitions of “property,” “interest,” and “person” in the new statute, is to what extent the statute is intended to govern the disclaimer of legal title by a trustee, in other words, the trustee’s rejection of a devise or transfer in trust. Although the broad language in the definitions supports the conclusion that the disclaimer statute is intended to encompass rejection of

<sup>77</sup>IND. CODE § 32-3-2-6 (Supp. 1983).

<sup>78</sup>*Id.* §§ 32-3-2-3 to -6.

<sup>79</sup>For a similar discussion, see G. HENRY, PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA Ch. 25, § 12 (7th ed. J. Grimes 1978, Supp. 1983).

<sup>80</sup>IND. CODE § 32-3-2-2 (Supp. 1983). The right to disclaim exists in spite of a spendthrift provision, as under former section 29-1-6-4(e). *Id.* § 32-3-2-12.

<sup>81</sup>“‘Property’ means tangible or intangible property, regardless of its location, that is either real or personal. The term includes: (1) the right to receive proceeds under a life insurance policy or annuity; and (2) an interest in an employee benefit plan.” *Id.* § 32-3-2-1.

<sup>82</sup>“‘Interest’ means a present or future interest that is either equitable or legal. The term includes a power in trust and a power to consume, appoint, or apply an interest for any purpose.” *Id.*

<sup>83</sup>“‘Person’ means any individual, corporation, organization, or other entity that is entitled to possess, enjoy, or exercise power over an interest. The term includes a trustee and a person succeeding to a disclaimed interest.” *Id.*

<sup>84</sup>The introductory comments provide, in part:

The Chapter is intended to govern every disclaimer of an interest, no matter when created, in property, including real estate, no matter where located, and no matter by what means the interest devolves so long as a relationship exists between Indiana and the persons, property or means of devolution involved in the disclaimer. Such a relationship must have enough substance to justify the exercise of Indiana’s jurisdiction.

IND. CODE ANN. § 32-3-2 introductory comments (West Supp. 1983-84).

a devise or transfer in trust by the named trustee of that trust, it is also likely that the intent was to leave intact the trustee rejection provision of Indiana Code section 30-4-2-2. When enacting the disclaimer statute, the legislature repealed two Trust Code provisions, sections 30-4-2-3 and 30-4-2-4, but did not repeal section 30-4-2-2, thereby indicating the intent to leave section 30-4-2-2 in effect. The Trust Code provision, section 30-4-2-2, should stand either as the exclusive statutory pronouncement on trustee rejection of a trust or at least as an alternative to the procedure set forth in the disclaimer statute.

Three sections of the new chapter may apply to a disclaimer by an heir or devisee of a decedent, depending on whether or not the interest is a survivorship interest.<sup>85</sup> Similarly, four sections of the new chapter may apply to a disclaimer of a trust beneficiary's interest, depending on whether the beneficiary has an interest devolved from a decedent,<sup>86</sup> or an interest with the right of survivorship,<sup>87</sup> or an interest devolving by other means.<sup>88</sup>

Other sections of the new chapter, specifically the section dealing with waiver of the right to disclaim<sup>89</sup> and the sections describing events that bar the right to disclaim,<sup>90</sup> apply to all disclaimers, including disclaimers by heirs, devisees, and trust beneficiaries.

2. *Requirements Generally.*—Section 32-3-2-2 provides that all disclaimers “shall: (1) be in writing; (2) describe the property and the interest in the property to be disclaimed; and (3) be signed by the person to whom the interest devolve[d], or his personal representative, guardian, or conservator.”<sup>91</sup> As under former law, the disclaimer may be in whole or in part,<sup>92</sup> though for partial disclaimers in particular, care must be taken to describe the disclaimed interest with reasonable certainty.<sup>93</sup>

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<sup>85</sup>IND. CODE § 32-3-2-3 (Supp. 1983) governs the disclaimer of all interests devolved from a decedent, except survivorship interests, which are governed by sections 32-3-2-5 and 32-3-2-7.

<sup>86</sup>*Id.* § 32-3-2-3.

<sup>87</sup>*Id.* §§ 32-3-2-5, -7.

<sup>88</sup>*Id.* §§ 32-3-2-6, -7.

<sup>89</sup>*Id.* § 32-3-2-9.

<sup>90</sup>*Id.* §§ 32-3-2-10, -11.

<sup>91</sup>*Id.* § 32-3-2-2.

<sup>92</sup>The commission comments provide:

Partial disclaimers are permitted of a portion or a fractional part of the property or the interest; also of any limited interest or estate in the property. For example, the recipient of a fee may disclaim only a life estate and retain the remaining interest. A power of appointment, or a power in trust such as an investment or administrative power, or other powers relating to property may be disclaimed either entirely, or partially by reducing or limiting the power as to amount or object or subjecting the power to a condition.

IND. CODE ANN. § 32-3-2-2 commission comments (West Supp. 1983-84).

<sup>93</sup>The commission comments state:

The disclaimer must also describe the interest with sufficient particularity to iden-

An effective disclaimer is “irrevocable . . . [and] binding upon the disclaimant and all persons claiming through or under him.”<sup>94</sup> Additionally, the right to disclaim may be waived in writing<sup>95</sup> and may be barred by events, listed in the statute, inconsistent with a disclaimer, such as acceptance of a benefit to the extent of such acceptance,<sup>96</sup> transferring, encumbering, or pledging the interest,<sup>97</sup> or permitting a sale by judicial process.<sup>98</sup>

3. *Interests Devolved from a Decedent*.—Section 32-3-2-3, applicable to disclaimers by heirs and devisees, including beneficiaries of testamentary trusts,<sup>99</sup> provides:

(a) Subject to subsections (b) and (c), a disclaimer of an interest (except for an interest with the right of survivorship) that has devolved from a decedent either by the laws of intestacy or under a testamentary instrument, including a power of appointment exercised by a testamentary instrument, is effective only if it is:

(1) filed in court in which proceedings concerning the decedent's estate are pending, or, if no proceedings are pending, in a court in which proceedings could be pending if commenced; and

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tify the property and the interest therein disclaimed. A formula which provides a means whereby the property and the interest therein disclaimed can be identified is sufficient. This requirement of identification is mandatory in every case and is particularly important when the disclaimer relates to real estate because of the requirement of the Chapter that the disclaimer to be effective must be recorded to provide readily accessible title information.

*Id.*

<sup>94</sup>IND. CODE § 32-3-2-9(a) (Supp. 1983).

<sup>95</sup>*Id.* § 32-3-2-9(b). This section is new substantive law. Formerly, section 29-1-6-4(d) provided that a “waiver of the right to renounce . . . bars the right to renounce as to the property.” IND. CODE § 29-1-6-4(d) (1982) (repealed 1983). Nothing else was said about waiver.

A written waiver is “irrevocable upon signing.” IND. CODE § 32-3-2-9(b)(1) (Supp. 1983). This is a new provision, and it could create substantial problems of proof. For example, the right to disclaim may be waived whenever a credible witness can testify that he saw the disclaimant sign a waiver, regardless of whether the signed waiver can be found.

<sup>96</sup>IND. CODE § 32-3-2-11 (Supp. 1983). Previously, acceptance barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>97</sup>IND. CODE § 32-3-2-10(1) (Supp. 1983). Contracting to transfer, encumber, or pledge also bars the right to disclaim. *Id.* § 32-3-2-10(2). The same actions barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>98</sup>IND. CODE § 32-3-2-10(3) (Supp. 1983). Sale or other disposition previously barred the right to renounce under section 29-1-6-4(d). IND. CODE § 29-1-6-4(d) (1982) (repealed 1983).

<sup>99</sup>Although testamentary trust beneficiaries formerly had the option of renouncing under either the Trust Code provisions or the Probate Code provisions, *In re Estate of Newell*, 408 N.E.2d 552 (Ind. Ct. App. 1980), after July 1, 1983, all will beneficiaries, including testamentary trust beneficiaries, and all heirs at law must follow Indiana Code chapter 32-3-2 to disclaim interests devolved from a decedent.

(2) delivered in person or mailed by first class United States mail to the personal representative of the decedent, or to the holder of the legal title to the property to which the interest relates.

(b) A disclaimer of an interest in real property is effective under subsection (a) only if it is recorded in each county where the real property is located.

(c) A disclaimer is effective under this section only if the requirements of subsection (a) and, if applicable, subsection (b) are accomplished not later than nine (9) months after the death of the decedent if a present interest is disclaimed, or, if a future interest is disclaimed, not later than nine (9) months after the later of:

(1) the event by which the final taker of the interest is ascertained; or

(2) the day on which the disclaimant attains the age of twenty-one (21).

(d) If provision has not been made for another devolution, an interest disclaimed under this section devolves as if the disclaimant had predeceased the decedent. A disclaimer under this section relates back for all purposes that relate to the interest disclaimed to a time immediately before the death of the decedent.<sup>100</sup>

Several changes are made by this section. First, if the disclaimed interest is an interest in real property, the disclaimer is not effective unless and until it is recorded in the county or counties where the real property is located.<sup>101</sup>

Second, the relation back language in the new chapter is slightly different from the relation back language in the repealed Probate Code renunciation statute.<sup>102</sup> However, the relation back language of the new statute should be just as effective as the former language to negate the disclaimant's liability for inheritance tax.<sup>103</sup>

Third, the disclaimer period is extended beyond nine months after the death of the decedent if the interest disclaimed is a future interest.

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<sup>100</sup>IND. CODE § 32-3-2-3 (Supp. 1983).

<sup>101</sup>Under prior law, the disclaimer of an interest in real property was presumably effective against anyone with notice or knowledge of it, without recording. Recording would afford constructive notice. IND. CODE § 29-1-6-4 (1982) (repealed 1983).

<sup>102</sup>In the former Probate Code provision, the disclaimer related back "for all purposes to the date of death of the decedent." IND. CODE § 29-1-6-4(c) (1982) (repealed 1983). Under the new statute, the disclaimer "relates back for all purposes that relate to the interest disclaimed to a time immediately before the death of the decedent." IND. CODE § 32-3-2-3(d) (Supp. 1983).

<sup>103</sup>The commission comments provide:

[T]he phrase "for all purposes" . . . means that the effect of the disclaimer is the same as though the disclaimed interest had never been created in the disclaim-

In such cases, the disclaimer period is extended until nine months after the “event by which the final taker of the interest is ascertained”<sup>104</sup> or “the day the disclaimant attains . . . age twenty-one,”<sup>105</sup> whichever is later. Under prior law, there was no extension for the disclaimant’s minority, regardless of whether the interest disclaimed was a present or a future one. However, there was an extension until nine months after “the event by which the taker is finally ascertained” for both present and future interests.<sup>106</sup>

Finally, in the new statute, there is no shortening of the disclaimer period in the event the estate is closed before the relevant nine-month period has run. Under prior law, there was a shortening of the disclaimer period to the time of estate closing if the estate was closed within the relevant nine-month period.<sup>107</sup>

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ant. As a consequence creditors of the disclaimant and his estate, including Indiana inheritance tax and other taxing authorities, have no claim against or right in the disclaimed property nor does anyone claiming through the disclaimant or his estate.

IND. CODE ANN. § 32-3-2-3 commission comments (West Supp. 1983-84) (citation omitted).

<sup>104</sup>IND. CODE § 32-3-2-3(c)(1) (Supp. 1983). The commission comments state that this phrase is *intended* to refer to the time of possession and enjoyment:

The phrase “*event by which the final taker of the interest is ascertained*” . . . means the event by which the holder of the future interest becomes entitled to present possession and enjoyment even though the interest may still be limited by its nature (such as a life estate or a life estate on special limitation) or by a condition subsequent.

IND. CODE ANN. § 32-3-2-3 commission comments (West Supp. 1983-84).

The example given in the comments indicates that a condition subsequent, which might divest an interest, does not postpone ascertainment of the taker. Thus,

in the case of a gift to a daughter if she survives a son but if a daughter survives the son and attains 60 years without issue then over to charity on the daughter’s death, the event by which the interest of the daughter is finally ascertained . . . is when the daughter survives the son and not when the daughter attains 60 years with issue and the absolute interest of the daughter can no longer be defeated.

*Id.*

What if the gift was “to husband for life, then to my daughter if she attains age 25?” If the husband is still alive when the daughter reaches 25, the daughter is not entitled to actual possession because of the husband’s life estate, yet the daughter’s attaining age 25 appears to be the “event by which the taker is finally ascertained.” Must the daughter renounce within nine months of attaining age 25 or does she have until nine months after the husband’s death?

<sup>105</sup>IND. CODE § 32-3-2-3(c)(2) (Supp. 1983).

<sup>106</sup>IND. CODE § 29-1-6-4(b) (1982) (repealed 1983). The following is one example of the difference between the provisions. Under the new statute, if a will contest occurs and is not decided within nine months after the decedent’s death, all will beneficiaries who are devised a present interest, and heirs at law since they would nearly always receive a present interest, must nonetheless decide whether to disclaim within nine months after death, even though the final taker of the interest is not ascertained. Under prior law, the heirs and devisees would have had nine months after resolution of the will contest to decide whether to disclaim. *Id.* A similar difference would occur if a will construction action was brought to determine the takers of the decedent’s property.

<sup>107</sup>*Id.*

4. *Survivorship Interests.*—Section 32-3-2-5 applies to the “disclaimer of an interest in a joint tenancy created by any means, including an intestacy, a testamentary instrument, or the exercise of a power of appointment by a testamentary interest.”<sup>108</sup> In the disclaimer statute, the term “joint tenancy” is defined as “any interest with the right of survivorship.”<sup>109</sup>

As in section 32-3-2-3, a disclaimer of a survivorship interest in real property must be recorded,<sup>110</sup> and the disclaimed interest will pass as though the disclaimant died immediately before creation of the interest.<sup>111</sup> The disclaimer must be mailed “either to the transferor of the interest or his personal representative, or to the holder of the legal title to the property to which the interest relates.”<sup>112</sup>

Under section 32-3-2-5, those who are devised a survivorship interest, or those to whom a survivorship interest descends,<sup>113</sup> have a significantly longer time to disclaim than they had under the former law.<sup>114</sup> Survivorship interests may be disclaimed “not later than nine (9) months after the event by which the final taker of the entire interest is ascertained.”<sup>115</sup> Thus, if *O* devised Blackacre to *A*, *B*, and *C* as joint tenants with rights of survivorship, the survivor of *A*, *B*, and *C* would be able to disclaim within nine months after the death of the second to die of *A*, *B*, and *C*, unless the survivor had waived the right to disclaim or the right was deemed barred by his conduct.<sup>116</sup> The death triggering the running of the nine-month period might not occur until several years after the creation of the joint tenancy.<sup>117</sup> Potentially, the entire joint tenancy could be disclaimed several years after its creation.

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<sup>108</sup>IND. CODE § 32-3-2-5(b) (Supp. 1983).

<sup>109</sup>*Id.* § 32-3-2-5(a).

<sup>110</sup>*Id.* § 32-3-2-7(b).

<sup>111</sup>*Id.* § 32-3-2-5(c). The relation back language is essentially identical to that in section 32-3-2-3. See *supra* notes 98-106 and accompanying text.

<sup>112</sup>*Id.* § 32-3-2-7(a).

<sup>113</sup>The only time a survivorship interest would descend is if real estate were distributed in kind to the surviving parents or grandparents of the decedent. *Id.* § 29-1-2-1(c)(2), (c)(3), (c)(5), (c)(6), (c)(7).

<sup>114</sup>The former law was found in IND. CODE § 29-1-6-4(b) (1982) (devises) (repealed 1983) and IND. CODE § 30-4-2-3(b) (1982) (trusts) (repealed 1983).

<sup>115</sup>IND. CODE § 32-3-2-5(b)(2) (Supp. 1983). See *supra* note 104 for the commission comments regarding the meaning of the similar phrase “event by which the final taker of the interest is ascertained.”

<sup>116</sup>Neither the statute nor the comments mention the effect of a severance of the survivorship interests, but logically, the new tenants in common would have nine months after severance to disclaim.

<sup>117</sup>If, for example, *B* and *C* survived *A*, and ultimately *C* survived *B*, *C* can disclaim within nine months of *B*'s death. Then *B*'s personal representative would have nine months after *C*'s disclaimer to disclaim. If *B*'s personal representative did not disclaim, then the property would remain in *B*'s estate. If *B*'s personal representative did disclaim, then *A*'s personal representative would have nine months after *B*'s disclaimer to disclaim. *A*'s estate might need to be reopened, and if *A* disclaims, *O*'s estate might need to be reopened. Of

5. *Other Interests.*—Sections 32-3-2-6 and 32-3-2-7 apply to the disclaimer of all other property interests, including nonsurvivorship beneficial interests in inter vivos trusts.<sup>118</sup> The disclaimer period is nine months after creation of the interest if the interest is a present interest,<sup>119</sup> or nine months after the “event by which the final taker of the interest is ascertained”<sup>120</sup> or the “day on which the disclaimant obtains the age of twenty-one,” whichever is later, if the interest is a future interest.<sup>121</sup>

If the disclaimed interest is an interest in real property,<sup>122</sup> the disclaimer is not effective unless or until it is recorded in the county or counties where the real property is located.<sup>123</sup> The disclaimer is effective only if it is delivered in person or mailed “to the transferor of the interest or his personal representative, or to the holder of the legal title to the property to which the interest relates.”<sup>124</sup>

A disclaimed interest passes as if the disclaimant had predeceased its creation.<sup>125</sup> The disclaimer “relates back for all purposes that relate to the interest disclaimed to the time immediately before the creation of the interest.”<sup>126</sup>

6. *Effective Dates.*—The new chapter became effective July 1, 1983. Retroactive application of the chapter validates any renunciation or disclaimer made between December 31, 1976, and July 1, 1983, that would have been valid under the provisions of the new chapter.<sup>127</sup> If the right

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course, *A*, *B*, or *C* may have waived the right to disclaim or the right may be deemed barred by their conduct. See *supra* notes 101-05.

<sup>118</sup>IND. CODE § 32-3-2-4 (Supp. 1983), which is not discussed in the text, applies to the disclaimer of interests under life insurance policies and annuities, which must be accomplished within nine months after the death of the insured.

<sup>119</sup>Creation of the interest is defined as “the date on which the person creating the interest no longer has a power to: (1) revoke the transfer; or (2) determine by any means the recipient of the interest or of its benefits.” *Id.* § 32-3-2-1.

<sup>120</sup>See *supra* note 104 for the commissioner comments regarding the meaning of the quoted phrase.

<sup>121</sup>IND. CODE § 32-3-2-6(a) (Supp. 1983). Under a former Trust Code provision, IND. CODE § 30-4-2-3 (1982) (repealed 1983), the disclaimer period was nine months after the beneficiary “receives written notice of his interest and that interest has been indefeasibly fixed as to both quality and quantity.” *Id.* This former disclaimer provision provided no different period for the disclaimer of present and future interests, and contained no extension for minors. In essence, however, the disclaimer period of the former statute encompassed in part what is in the new statute an extension only for disclaimants of future interests.

<sup>122</sup>Presumably, Indiana Code section 30-4-2-7 applies to establish whether a trust beneficiary’s interest is real or personal property.

<sup>123</sup>IND. CODE § 32-3-2-7(b) (Supp. 1983). Under prior law, the disclaimer of an interest in real property was presumably effective against anyone with notice or knowledge of it, without recording. IND. CODE § 30-4-2-3(b) (1982) (repealed 1983). There was no recording requirement under the Trust Code.

<sup>124</sup>IND. CODE § 32-3-2-7(a) (Supp. 1983).

<sup>125</sup>*Id.* § 32-3-2-6(b).

<sup>126</sup>*Id.* See *supra* note 102. The former Trust Code, IND. CODE § 30-4-2-4 (1982) (repealed 1983), contained no broad relation back language.

<sup>127</sup>IND. CODE § 32-3-2-15(b) (Supp. 1983).



to disclaim existed on July 1, 1983, a present interest may be disclaimed by complying with the new chapter before April 1, 1984, and a future interest may be disclaimed by complying with the new chapter not later than nine months after the "event by which the final taker of the interest is ascertained"<sup>128</sup> or nine months after the "day on which the disclaimant attains the age of twenty-one," whichever is later.<sup>129</sup>

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<sup>128</sup>*Id.* § 32-3-2-15(a)(1).

<sup>129</sup>*Id.* § 32-3-2-15(a)(2).

## XVI. Uniform Commercial Code

GERALD L. BEPKO\*

### A. Introduction

There have been many developments of significance during the survey period on the subjects of commercial and consumer law. Because of the number and complexity of these developments, no effort has been made to discuss them all. Instead, this Survey Article includes a discussion of one significant recent development in each of the following categories: secured transactions, commercial paper, sales, and consumer law. The secured transactions development concerns the priority given to buyers of farm products. On the subject of commercial paper there is a discussion of a bank's right of charge-back under UCC section 4-212, and on the subject of sales there is a discussion of warranty disclaimers and an amendment to UCC section 2-316(3). Finally, in the area of consumer law, a new Indiana statute on health spa services is described.

### B. Secured Transactions—Priority for Buyers of Farm Products

The Uniform Commercial Code (UCC) defines and gives a priority to a buyer of goods in the ordinary course of business in at least two situations. Under UCC section 2-403(2),<sup>1</sup> the ordinary course buyer has a priority over the owner of goods who has entrusted the goods to a merchant dealing in goods of that kind. Under UCC section 9-307(1),<sup>2</sup> the ordinary course buyer also has a priority over a security interest created by the seller even if that security interest is perfected. In this latter context the protection given to the ordinary course buyer does not extend to a person who buys farm products from a person engaged in farming operations unless the security interest was not perfected.<sup>3</sup> This lack of protection will be referred to as the "farm products exception" to the basic priority accorded to ordinary course buyers.

The farm products exception is deeply rooted in commercial law history.<sup>4</sup> In this century ordinary course buyers have been protected con-

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<sup>1</sup>IND. CODE § 26-1-2-403(2) (1982). There is no farm products exception to the protection accorded by this section.

<sup>2</sup>*Id.* § 26-1-9-307(1) (Supp. 1983).

<sup>3</sup>*Id.* § 26-1-9-301(1)(c) (1982) (a buyer not in ordinary course takes priority over an unperfected security interest to the extent that he gives value and reserves delivery without knowledge of the security interest).

<sup>4</sup>See generally, 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 26.10 (1965).

sistently against claims of inventory financiers.<sup>5</sup> Although there seems to be a formal similarity between the inventory buyer and a buyer of farm products, it is clear that, over the decades, the agricultural financier has been more successful in this type of dispute than the inventory financier. Thus, by engrafting the farm products exception on section 9-307(1), the Uniform Commercial Code drafters simply codified existing custom.<sup>6</sup>

It is less clear why the agricultural financier has been more successful. Perhaps it has been because, unlike the typical inventory purchaser, a buyer of farm products often purchases a substantial portion of the farmer's yield. In such a case the purchaser of farm products may be expected to investigate and discover prior liens because he has a sufficient stake in the purchase. Professor Gilmore, in his treatises on security interests in personal property, offered a sociological explanation for the farm products exception:

Perhaps a small country bank holding a small country mortgage makes a more appealing plaintiff than a national finance company doing a multi-million dollar business in inventory financing. . . . [I]t may be that a buyer who is a large cannery or agricultural cooperative—in any case a professional who knows the facts of life—makes a less appealing defendant than the untutored consumer who is the chief beneficiary of the inventory rule.<sup>7</sup>

Professor Gilmore was quick to note, however, that, even in 1965 when he published his books, many of the crop mortgagees were agencies of the United States Government and not small country banks.<sup>8</sup>

Perhaps because there has been no clearly understood basis for the farm products exception, it has come under increasing attack in recent years. Particularly at the insistence of grain dealers and cooperatives, it has been the subject of proposed legislation in many states,<sup>9</sup> as well as the subject of an increased volume of litigation. Indiana, as a major agricultural state, has had activity on both fronts. Developments in both the Indiana General Assembly<sup>10</sup> and the Indiana Court of Appeals<sup>11</sup> during the survey period should increase the protection given to buyers of farm products.

On March 29, 1983, the Indiana Court of Appeals handed down its

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<sup>5</sup>*Id.* at § 26.1.

<sup>6</sup>*Id.* at § 26.11.

<sup>7</sup>*Id.* at § 26.10.

<sup>8</sup>*Id.*

<sup>9</sup>See, e.g., ILL. REV. STAT. ch. 26, § 9-307(1) 1974; OHIO REV. CODE ANN. § 1309.26(B) (Page 1979).

<sup>10</sup>Act of Apr. 21, 1983, Pub. L. No. 255-1983, § 1, 1983 Ind. Acts 1651, 1651-53 (codified as amended at IND. CODE § 26-1-9-307 (Supp. 1983)).

<sup>11</sup>*Anon, Inc. v. Farmers Prod. Credit Ass'n*, 446 N.E.2d 656 (Ind. Ct. App. 1983).

decision in *Anon, Inc. v. Farmers Production Credit Association*.<sup>12</sup> In this case the debtor, Flynn, a livestock processor, gave a security interest in hogs to Farmers Production Credit Association of Scottsburg (FPCA). The security agreement included the usual prohibition against sale of the hogs by the debtor without the prior written permission of FPCA. In disregard of this provision Flynn sold hogs to Anon on ten separate occasions between October, 1979, and October, 1980. No written permission for these sales was ever requested or provided. Flynn received ten checks as payment for the hogs, several of which he endorsed over to FPCA, but he kept payments totaling \$12,430.33. When Flynn defaulted, FPCA sued Anon for conversion claiming that its security interest continued in the hogs purchased by Anon. After a bench trial the court held for FPCA stating that FPCA did not consent to the sale, did not intend to waive its security interest, and did not impliedly waive the security interest by the manner in which it did business.<sup>13</sup> Of course, Anon could not claim protection as a buyer in the ordinary course under UCC section 9-307(1) because of the farm products exception.

The court of appeals reversed. In its opinion the court emphasized the following testimony on cross examination of the managing officer of FPCA:

Q. O.K. So there was no doubt in your mind that Benny was going to sell hogs?

A. That's right.

\* \* \* \* \*

Q. Now in your security agreement and financing statement there is a section, I believe it is section #6, that states that Benny is not supposed to sell any livestock that is pledged under that particular agreement without the prior written consent of PCA. Is that correct?

A. Yes.

\* \* \* \* \*

Q. Did you ever require Benny Flynn to—during the course of this particular loan that we are talking about . . . did you require Benny Flynn to get your prior written consent to make a sale of hogs?

A. No.

Q. You never did?

A. No.

Q. Even in spite of what your agreement said you didn't feel that was necessary?

A. O.K. We normally trusted our members to do this and did not.

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<sup>12</sup>446 N.E.2d 656 (Ind. Ct. App. 1983).

<sup>13</sup>*Id.* at 657.

Q. O.K. So you trusted Benny Flynn as you stated. He could go out and sell his hogs whenever he wanted but you expected him to bring the proceeds in to you.

A. That's correct.

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Q. Once again to sum up your, what I understand your testimony to be, you were aware that Benny was selling hogs and you in fact wanted him to sell hogs. You just expected him and trusted him to come in and bring you the proceeds. Is that correct?

A. That's correct.<sup>14</sup>

On the basis of this testimony the court of appeals concluded that FPCA expected Flynn to sell the hogs and account for the proceeds and that the practice between the parties was *not* to enforce the requirement of written permission to sell the hogs.<sup>15</sup> The court said that "[w]hen FPCA consented to the sales on the condition that Flynn remit, it knowingly and intentionally renounced a known right, that is, the right to require prior written consent for each sale."<sup>16</sup> Once this barrier to sale had been eliminated, the disposition was authorized within the meaning of UCC section 9-306(2), which provides that "a security interest continues in collateral notwithstanding sale, exchange or other disposition . . . unless [the disposition] was authorized by the secured party in the security agreement or otherwise . . ."<sup>17</sup> Because the sale was authorized, FPCA's security interest did not continue in the goods sold and the purchaser, even though not protected as an ordinary course buyer by section 9-307(a), took free of the security interest.<sup>18</sup>

This result is consistent with decisions in several cases in other states.<sup>19</sup> In particular, the court adopted the result and rationale of *First National Bank & Trust Company v. Iowa Beef Processors*.<sup>20</sup> Although the reasoning of *First National Bank* and decisions in other states provide ample support for the court's decision in *Anon*, two noteworthy matters cut against the decision. One of these matters was not considered by the court and the other was considered but rejected. The court considered but rejected a line of cases which have refused to recognize conduct such as

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<sup>14</sup>*Id.* at 658.

<sup>15</sup>*Id.* at 662.

<sup>16</sup>*Id.*

<sup>17</sup>IND. CODE § 26-1-9-306(2) (1982).

<sup>18</sup>446 N.E.2d at 662.

<sup>19</sup>See *First Nat'l Bank & Trust Co. v. Iowa Beef Processors*, 626 F.2d 764 (10th Cir. 1980); *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973); *Farmers State Bank v. Edison Non-Stock Coop. Ass'n*, 190 Neb. 789, 212 N.W.2d 625 (1973); *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 226 Or. 643, 513 P.2d 1129 (1973).

<sup>20</sup>626 F.2d 764 (10th Cir. 1980).

the acquiescence in the *Anon* case as a waiver or authorization to sell.<sup>21</sup> These cases embrace the proposition that if an agreement is clear on its face, courts should be reluctant to infer a waiver from conduct, should infer a waiver only to prevent fraud, and should allow evidence of "course of dealing" only to interpret, not to contradict, a written term.<sup>22</sup> Along this line of reasoning one state amended its commercial code to prevent a waiver by conduct and specifically overruled a decision similar to the one in *Anon*.<sup>23</sup>

The *Anon* court did not even consider the Indiana Supreme Court's recent decision in *Van Bibber v. Norris*.<sup>24</sup> One issue in *Van Bibber* was whether the debtor was in default at the time of repossession of the collateral. The debtor argued that the acceptance of late payments without comment operated as a waiver of the secured party's right to insist on strict compliance with the terms of the agreement specifying time for payment, unless the debtor was notified that the secured party again intended to treat late payment as a default. The supreme court rejected this position on the basis of a provision in the security agreement which stated that "[n]o waiver . . . of any default shall be effective unless in writing, nor operate as a waiver of any other default nor of the same default on a future occasion."<sup>25</sup> The enforcement of this anti-waiver clause, despite inconsistent conduct by the secured party, suggests that the supreme court might also enforce a "no sale without written permission" clause such as the one in the security agreement between *Anon* and FPCA, notwithstanding FPCA's inconsistent conduct. Indeed the debtor's specific reliance on the secured party's conduct in *Van Bibber* seems at least as deserving of protection as the buyer's position in *Anon*.

The *Anon* case probably will make lending against farm products more hazardous and increase the chances that a buyer will have a priority over the farm products financier. The hazards will not surface in the early stages of a financing relationship for it will take some time for any pattern of conduct which authorizes sale of the collateral to emerge. Nevertheless, at some stage the secured party will have to engage in some additional policing of the collateral and the debtor's conduct in order to avoid the plight of FPCA. Perhaps some measure of protection against this hazard could be achieved through better documentation. For example, where the collateral is crops, a new security agreement must be executed each year.<sup>26</sup> The *Anon* hazards may be circumvented by incorporating into the security agreement a provision which states that the secured party acknowledges

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<sup>21</sup>See 446 N.E.2d at 660-62.

<sup>22</sup>*Id.* at 661.

<sup>23</sup>N. M. STAT. ANN. § 55-1-205(3), (4) (1978) (overruling *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967)).

<sup>24</sup>419 N.E.2d 115 (Ind. 1981).

<sup>25</sup>*Id.* at 120.

<sup>26</sup>IND. CODE § 26-1-9-204(4)(a) (1982).

that the collateral under the previous year's agreement may have been sold without written permission, but insists on strict adherence to the requirement for this year's agreement.

Within a few days after the *Anon* decision was handed down, the Indiana General Assembly enacted an amendment to section 26-1-9-307(1) of the Indiana Code which may make the *Anon* case less significant. The amendment adds another measure of protection for farm products buyers and more hazards for farm products financiers. The story of this new legislation really begins in the 1982 Indiana General Assembly. In that session lobbyists who represented grain dealers and warehousemen pressed for more protection for buyers of farm products against farm products financiers. In what appeared to be a compromise, the General Assembly enacted Indiana Code section 26-1-9-307.5,<sup>27</sup> which required a secured party who filed a financing statement covering agricultural commodities to send written notice by certified mail to all warehousemen located within the county of the debtor's residence who were licensed under the Indiana Agricultural Commodities Warehousing Licensing and Bonding Statute.<sup>28</sup> This notice was to identify the debtor, the person filing the financing statement, and the commodity for which the financing statement was filed.<sup>29</sup> Failure by a secured party to give the required notice did not affect the validity or priority of the security interest, but constituted a Class C infraction.<sup>30</sup> Grain dealers and warehousemen found this compromise unsatisfactory for two reasons. First, it did not change the basic priority; grain dealers and cooperatives still bought agricultural commodities subject to the secured party's priority. Second, the amendment covered only agricultural commodities as defined in the Agricultural Commodities Warehouse Licensing and Bonding Statute and probably did not apply to cases such as *Anon* where the collateral, though a farm product, was not an agricultural commodity.

As a result of this dissatisfaction, the same forces were back at work in the 1983 General Assembly and Indiana Code section 26-1-9-307 was amended<sup>31</sup> and Indiana Code section 26-1-9-307.5 was repealed.<sup>32</sup> This time the General Assembly changed the basic priority and eliminated the language which created the farm products exception.<sup>33</sup> At the same time the 1983 amendment to Indiana Code section 26-1-9-307(1) created a scheme whereby secured parties may attempt to preserve their historical

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<sup>27</sup>Act of Feb. 25, 1982, Pub. L. No. 157, § 1, 1982 Ind. Acts 1206, 1206-07 (codified at IND. CODE § 26-1-9-307.5 (1982)) repealed by Act of Apr. 21, 1983, Pub. L. No. 255-1983, § 3, 1983 Ind. Acts 1651, 1656.

<sup>28</sup>IND. CODE § 26-3-7-2 (1982).

<sup>29</sup>*Id.* § 26-1-9-307.5(4) (repealed 1983).

<sup>30</sup>*Id.* § 26-1-9-307.5(8), (9).

<sup>31</sup>Act of Apr. 21, 1983, Pub. L. No. 255-1983, § 1, 1983 Ind. Acts 1651, 1651-53 (codified as amended at IND. CODE § 26-1-9-307 (Supp. 1983)).

<sup>32</sup>Act of Apr. 21, 1983, Pub. L. No. 255-1983, § 1, 1983 Ind. Acts 1651, 1656.

<sup>33</sup>IND. CODE § 26-1-9-307(1) (Supp. 1983).

priority position.<sup>34</sup> The new statute provides that a person buying farm products from a person engaged in farming operations is not protected as a buyer in the ordinary course if he "has received prior written notice of the security interest."<sup>35</sup> Written notice is defined as "notice on a form prescribed by the Secretary of State" which contains specific information about the security agreement.<sup>36</sup> The secured party can employ this written notice through a procedure set forth in the statute. The secured party may request that the debtor provide a list of those persons who are potential buyers of the farm products.<sup>37</sup> Indiana Code section 26-1-9-307(1)(c) now provides that, if requested to do so by a secured party, "[a] debtor engaged in farming operations who has created a security interest in farm products must provide the secured party with a written list of potential buyers."<sup>38</sup> The secured party may then send the notice on the form provided by the Secretary of State to all of the persons on the list. The secured party thus triggers three provisions of new Indiana Code section 26-1-9-307(1). First, section 9-307(1)(c) provides that "[t]he debtor may not sell farm products to a buyer who does not appear on the list."<sup>39</sup> Second, a purchaser must issue a check for payment jointly to the debtor and the secured party from whom he received prior written notice.<sup>40</sup> Third, the notice prevents those receiving it from gaining a priority as buyers in the ordinary course.<sup>41</sup>

With respect to this third provision, in order to be considered "prior written notice" the notice must "be received before a buyer of farm products has made full payment . . . for the farm products."<sup>42</sup> The notice "expires eighteen (18) months after the date the secured party signs the notice or at the time the debt that appears on the notice is satisfied, whichever occurs first."<sup>43</sup> This language may create two interpretation problems. The notice is "prior written notice" if it is received before the buyer has made "full payment." This suggests that the notice is effective, and a buyer will not gain buyer-in-the-ordinary-course protection, if only part payment, such as a down payment, has been made at the time notice is received. It seems harsh to tie buyer-in-the-ordinary-course protection to "full payment"—a requirement not imposed for other buyers in the ordinary course.<sup>44</sup> Perhaps the courts will prorate losses and give

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<sup>34</sup>*Id.* § 26-1-9-307(1)(a)—(c).

<sup>35</sup>*Id.* § 26-1-9-307(1)(a).

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* § 26-1-9-307(1)(c).

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* § 26-1-9-307(1)(d). See *infra* notes 48-51 and accompanying text.

<sup>41</sup>IND. CODE § 26-1-9-307(1)(a) (Supp. 1983).

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>A buyer in the ordinary course may acquire goods on secured or unsecured credit. See IND. CODE § 26-1-1-201(9) (1982).



buyer-in-the-ordinary-course protection to the extent payment has been made, although this result is not suggested by the language of new Indiana Code section 26-1-9-307(1). Moreover, the notice may expire at the time "the debt that appears on the notice is satisfied"<sup>45</sup> although no potential buyers have been notified of satisfaction. This could create uncertainty as to the continuing efficacy of notice, especially in cases where the parties renew their entire documentation each year in order to take account of the limitations on after-acquired interests in crops under UCC section 9-204(4).<sup>46</sup>

Another problem under the new statute concerns satisfaction of the debt. Indiana Code section 26-1-9-307(1)(b) provides that "[a] secured party must within fifteen (15) days of the satisfaction of the debt inform a buyer in writing whenever a debt has been satisfied and written notice . . . had been previously sent to that buyer."<sup>47</sup> The language of this provision leads to the conclusion that notice of satisfaction need be sent only to "buyers" and not to all persons to whom written notice of the security interest had been sent initially. If this interpretation is correct, this provision seems to have been written on the assumption that the secured party will know of every sale and the identity of any buyer. Undoubtedly this would be so in many cases. The buyer with "prior written notice" would purchase subject to the security interest and all parties would be aware of the purchase. When the debtor paid off the secured credit, the secured party would inform the buyer within fifteen days in accordance with this provision. Nevertheless, it is curious that such an assumption would be made in drafting a statute which addresses problems associated with unauthorized and often clandestine sales of farm products. In any case, this requirement may place a significant policing burden on the secured party or, as a practical matter, force the secured party to provide notice of satisfaction to all persons who received the "written notice" initially.

One of the three benefits triggered by "written notice" is found in new Indiana Code section 26-1-9-307(1)(d), which provides that a purchaser with prior written notice must issue a check for payment jointly to the debtor and the secured party.<sup>48</sup> A buyer with prior written notice cannot achieve buyer-in-the-ordinary-course protection and generally would take subject to the security interest. As a result, it is likely that the secured party would be protected by being able to recover the collateral and the need for the protection accorded by the jointly payable check requirement would be diminished. The secured party would not be able to claim the collateral, however, where the buyer claims that the sale is authorized under UCC section 9-306(2).<sup>49</sup> In this situation, the jointly payable check requirement could have its maximum impact. Unfortunately, there is no

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<sup>45</sup>IND. CODE § 26-1-9-307(1)(a) (Supp. 1983).

<sup>46</sup>*Id.* § 26-1-9-204(4)(a) (1982).

<sup>47</sup>*Id.* § 26-1-9-307(1)(b) (Supp. 1983).

<sup>48</sup>*Id.* § 26-1-9-307(1)(d).

<sup>49</sup>*Id.* § 26-1-9-306(2) (1982).

sanction imposed for failure to have the check for payment made payable jointly even though criminal sanctions are imposed for failure to meet other requirements of new Indiana Code section 26-1-9-307(1).<sup>50</sup> One may assume that the drafters would have wanted to insure that a buyer with prior written notice who failed to have the payment check made jointly payable would not achieve a priority under any circumstances, but this is not made explicit in the statute. Perhaps courts would reach this result by analyzing the buyer's conduct under the general obligations of good faith,<sup>51</sup> or by concluding that Indiana Code section 26-1-9-307(1)(d) establishes a liability in favor of the secured party which cannot be discharged except by a jointly payable check.

There is one final curiosity in the new statute. Indiana Code section 26-1-9-307(1)(d) now provides that "[a] purchaser of farm products (on which there is a perfected security interest) . . . who withholds all or part of the proceeds of the sale from the seller, in order to satisfy a prior debt . . . owed by the seller to the buyer, commits a Class C infraction."<sup>52</sup> For this purpose a prior debt does not include the cost of marketing the farm product or the cost of transporting the farm product to the market.<sup>53</sup> It is not clear what vice this provision was designed to address. It is clear, however, that the transfer of farm products to a person in total or partial satisfaction of a money debt does not constitute "buying" and the transferee is not a buyer in the ordinary course of business.<sup>54</sup> Therefore, under the old or new statute, the secured party could recover collateral sold without authority to such a buyer. Because this does not seem to be a transaction which could be troublesome for the secured party, it is surprising that the drafters prohibited this type of transaction and imposed criminal sanctions. In addition, the breadth of this language may preempt some perfectly innocent transactions. For example, suppose Farmer Jones owes Grain Dealer \$5,000. At the same time Jones owns \$10,000 worth of farm products subject to a perfected security interest in favor of Local Bank which secures a liquidated obligation of \$5,000. Jones wants to sell and Grain Dealer wants to buy the farm products for \$5,000 cash and discharge of the \$5,000 debt. Even if the \$5,000 check for payment was made payable to Jones and Local Bank, and even if the security of Local Bank would not be affected by the sale because Grain Dealer would not qualify as an ordinary course buyer, such an arrangement would seem to leave Grain Dealer exposed to criminal sanctions.

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<sup>50</sup>For example, criminal sanctions are imposed on a debtor for selling to a buyer not on a list furnished to a secured party. *Id.* § 26-1-9-307(1)(c).

<sup>51</sup>Indiana Code section 26-1-9-306(2) does not include an explicit good faith standard, but section 26-1-1-203 imposes a general obligation of good faith in all transactions. IND. CODE § 26-1-1-203 (1982).

<sup>52</sup>*Id.* § 26-1-9-307(1)(d) (Supp. 1983).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* § 26-1-1-201(9) (1982).

The combined impact of the *Anon* case and the amendments to UCC section 9-307(1) will make it more difficult for a secured party to gain a priority over buyers of farm products. If a secured party takes steps to provide potential buyers with notice under new Indiana Code section 26-1-4-307(1)(a), the buyer of farm products may be prevented from qualifying as a buyer in the ordinary course of business. But even if the secured party has sent notice to all potential buyers on the list provided by the debtor, there still may be a buyer in the ordinary course to take a priority. A debtor who is inclined to sell in violation of the terms of the security agreement surely will pick someone who is not on the list; as to that purchaser, there will be no prior written notice. If it is difficult to find such a buyer in the community where the debtor resides, the debtor's mischief will only be made more complicated and difficult. Even if the purchaser does not qualify as an ordinary course buyer, the *Anon* case will give a purchaser an additional basis for priority. The result of all these developments may be a diminished willingness to accept farm products as collateral with some commensurate increase in price or reduction in the amount of credit available to farmers.

If this matter is the subject of continuing study, one aspect of these transactions should merit special focus. Earlier in this analysis it was suggested that one reason for the farm products exception was that buyers of the farm products are not like purchasers from inventory because their purchases may involve such a substantial part of the seller's product. To the extent that this type of purchaser may deserve different or less protection than an ordinary course buyer, the differences could be reflected in the definition of a buyer in the ordinary course. It may be that some purchasers of farm products, such as consumers purchasing at a roadside stand, should be entitled to protection as buyers in the ordinary course of business, but a purchaser of the entire year's yield of a farmer should not.

### C. *Commercial Paper—Collecting Bank Liability for Delay*

For purposes of bank collection, Article 4 of the Uniform Commercial Code distinguishes between payor banks and collecting banks. A payor bank is the bank on which an item such as a check is drawn and by which an item is payable.<sup>55</sup> A collecting bank is any other bank which handles the item for collection.<sup>56</sup> For example, assume that Customer has funds on deposit in a checking account at First Bank and Payee has a checking account at Second Bank. Assume further that Customer is indebted to Payee and draws a check on her account at First Bank payable to Payee. Payee then makes a deposit in his account at Second Bank

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<sup>55</sup>IND. CODE § 26-1-4-105(b) (1982).

<sup>56</sup>*Id.* § 26-1-4-105(d). The expression "collecting bank" includes depository banks and intermediary banks as defined in Indiana Code section 26-1-4-105(a) and (c).

which includes the check drawn by Customer. In handling this check for Payee, Second Bank is a collecting bank which, through regular banking channels, would bring about a presentment of the item to First Bank, the payor bank.

Article 4 of the Uniform Commercial Code is drafted on the assumption that the payor bank plays a pivotal role in the check collection process. The payor bank should have in its records the authentic signature of persons authorized to draw on an account, the account balance, and stop orders or legal process affecting an account. Also, its actions are often the foundation for firming up numerous provisional transactions in the collection process. Because of this important role, UCC section 4-302(a)<sup>57</sup> provides that a payor bank must take certain actions promptly, generally before what is called its midnight deadline.<sup>58</sup> If a payor bank fails to meet these time requirements it is accountable for the item.<sup>59</sup> This means that the payor bank is liable for the face amount of the item even though the item may have been drawn on an account without funds and recourse by the bank against its customer is unlikely.

In contrast, collecting banks simply serve as agents for collection of items under Article 4.<sup>60</sup> As such, collecting banks usually possess much less information concerning the items they handle and play a less pivotal role than payor banks. As might be expected, in light of this different role, collecting banks generally are not subject to the same rigid requirements and sanctions as payor banks. UCC section 4-202(1)<sup>61</sup> provides a general standard of ordinary care for collecting banks. In what seems to be a refinement of the ordinary care standard, UCC section 4-202(2) provides that a collecting bank acts seasonably if it takes action, such as giving notice of dishonor, before its midnight deadline.<sup>62</sup> A reasonably longer time may be seasonable, but UCC section 4-202(2) provides that “the [collecting] bank has the burden of so establishing.”<sup>63</sup> UCC section 4-202 does *not* provide any sanctions such as “accountability” for failure of a collecting bank to use ordinary care or to act seasonably.

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<sup>57</sup>*Id.* § 26-1-4-302(a).

<sup>58</sup>Indiana Code section 26-1-4-302 is drafted to accommodate a deferred posting practice. The payor bank must act before midnight of the banking day following the day of receipt by settling for it. Normally this is a provisional settlement which may be revoked if the payor bank ultimately decides not to honor the check for reasons such as insufficient funds in the account. In any case, the payor bank must pay or return the item, or send notice of dishonor before its midnight deadline. The midnight deadline for a bank is defined in Indiana Code section 26-1-4-104(1)(h) as “midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.”

<sup>59</sup>*Id.* § 26-1-4-302(a).

<sup>60</sup>*Id.* § 26-1-4-201(1).

<sup>61</sup>*Id.* § 26-1-4-202(1).

<sup>62</sup>*Id.* § 26-1-4-202(2).

<sup>63</sup>*Id.*

The only specific sanction for failure to use ordinary care is found in UCC section 4-103(5), which provides that "[t]he measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care."<sup>64</sup>

This language makes it clear that, at a minimum, a negligent collecting bank is responsible to its customer for the amount which could have been collected if the bank had exercised ordinary care. In addition, there has been speculation of further potential liability if the collecting bank's negligence consists of failure to give notice of dishonor before the midnight deadline. Most often the collecting bank will give a provisional credit for the item. UCC section 4-212(1) provides that the collecting bank may "charge-back the amount of any credit given for the item to its customer's account . . . if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts."<sup>65</sup> This language suggests that there is no right to charge-back or recover the credit if the collecting bank fails to act before its midnight deadline.

During the survey period, in *Appliance Buyers Credit Corp. v. Prospect National Bank*,<sup>66</sup> the United States Court of Appeals for the Seventh Circuit addressed this question of collecting bank liability under UCC section 4-212(1). In that case, Appliance Buyers Credit Corporation (Appliance) deposited two checks for collection at the Prospect National Bank on October 18, 1979. At that time Prospect National Bank gave a provisional credit to Appliance's account. Prospect National Bank then forwarded the checks through the Chicago Federal Reserve Bank which in turn forwarded the checks to the payor bank, the Corn Belt Bank of Bloomington. On October 22, 1979, the Corn Belt Bank dishonored the checks because there were no funds in the account on which the checks were drawn and notified the Federal Reserve Bank of the dishonor by telephone. On the following day, October 23, 1979, the Federal Reserve Bank notified Prospect National Bank of the dishonor by telephone. The Federal Reserve Bank then mailed the dishonored checks to Prospect National Bank and the checks arrived on October 29th. When Prospect National Bank received the dishonored checks it immediately revoked the provisional credit given to Appliance and notified Appliance of the dishonor. Unfortunately, this was well beyond the midnight deadline for Prospect National Bank since Prospect had been notified of the dishonor on October 23rd. On October 31st the drawer of the check became the subject of a bankruptcy proceeding.

Appliance filed suit against Prospect National Bank claiming that Pros-

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<sup>64</sup>*Id.* § 26-1-4-103(5).

<sup>65</sup>*Id.* § 26-1-4-212(1).

<sup>66</sup>708 F.2d 290 (7th Cir. 1983). This was an appeal from a decision of the District Court for the Central District of Illinois.

pect National Bank was liable for the amount of the check because of its delay in giving Appliance notice of dishonor. The district court dismissed the claim. Although the district court acknowledged that Prospect National Bank's failure to give timely notice constituted a failure to exercise ordinary care, the court found that Appliance failed to establish its damages. The court stated that

[b]ecause the plaintiff has not demonstrated that it had a reasonable chance to collect all or part of the amount of the checks, the amount plaintiff was actually damaged, if any, as a result of the bank's failure to exercise ordinary care in notification is pure speculation. . . . Because the court is unable to determine what an appropriate award of damages would be in this case, if any, none can be awarded.<sup>67</sup>

The district court also rejected Appliance's argument that UCC section 4-212(1) made Prospect Bank responsible for the face amount of the check.<sup>68</sup>

Appliance appealed and placed the question of extended liability for a collecting bank under UCC section 4-212(1) squarely before the court of appeals. Two of the three judges sitting for the case agreed with the district judge and the dismissal was affirmed. In their opinion for the court, Judges Coffey and Timbers acknowledged that the Prospect National Bank had failed to give the required notice and that UCC section 4-212(1) conditioned charge-back on giving proper notice. Nevertheless, they concluded that UCC section 4-212(1) "is silent on the measure of damages a depositor can recover, if any, when the bank breaches its duty of giving a timely notice of dishonor and still charges back the provisionally credited check."<sup>69</sup> They emphasized that the drafters of the Code knew how to establish liability for the face amount of an instrument by use of the word "accountable." The fact that the drafters did not use the word "accountable" in UCC section 4-212(1) suggests that it was not their intention to make a collecting bank automatically responsible for the face amount of the item. Instead they looked to the measure of damages provided by UCC section 4-103(5)—the face amount reduced by the amount which could not have been realized by the use of ordinary care. There was substantial evidence that the check in this case could not have been collected even if notice of dishonor had been given in a seasonable fashion. Judges Coffey and Timbers concluded that the plaintiff had the burden of proving the amount which could have been collected and that, because the plaintiff failed to offer proof on this subject, the district judge was correct in dismissing the case.<sup>70</sup>

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<sup>67</sup>*Id.* at 292 (quoting district court order).

<sup>68</sup>*See id.*

<sup>69</sup>*Id.* at 293.

<sup>70</sup>*Id.* at 293-94.

Judges Coffey and Timbers did not base their decision on UCC section 4-212(4), which provides that "[t]he right to charge-back is not affected by . . . failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable."<sup>71</sup> This language seems applicable and seems to support their decision. There is some reason to believe, however, that this language is a closed reference to UCC section 4-212(3) and applies only to cases where the collecting bank is also the payor bank. Because Judges Coffey and Timbers did not cite this language in support of their decision, it appears that they concluded that the language was limited in this way.

In his dissent, Judge Cudahy did not adopt Appliance's argument on UCC section 4-212(1), but created an intriguing middle ground position. His thesis was that once it has been established that the collecting bank failed to notify its customer in the time prescribed, UCC section 4-212(1) raises a presumption of injury to the customer. This presumption is combined with the formula for damages found in UCC section 4-103(5) in the following manner. The recovery specified by UCC section 4-103(5) is the face amount of the item reduced by the amount which could not have been realized with ordinary care. Judge Cudahy would have presumed that the injury caused by failure to give timely notice was equal to the face value of the check. The bank could have rebutted this presumption by proving that the item could not have been collected even if timely notice had been given.<sup>72</sup> This is consistent with the formulation of UCC section 4-103(5) which starts with a base liability to be *reduced* if there has been no injury.

#### D. Sales—Warranty Disclaimers

While several sections of Indiana's version of the Uniform Commercial Code have been the subject of special interest amendments,<sup>73</sup> only one, UCC section 2-316,<sup>74</sup> dealing with disclaimers of warranty, has been amended more than once.

The first special interest amendment to this section was enacted in 1980, apparently at the instance of livestock producers.<sup>75</sup> This amendment had the effect of limiting the warranty of merchantability. As amended Indiana Code section 26-1-2-316(3)(d) provides that "with respect to the sale of cattle, hogs, or sheep, there is no implied warranty that the cattle, hogs, or sheep are free from disease, if the seller shows that all state and federal regulations concerning animal health have been complied with."<sup>76</sup>

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<sup>71</sup>U.C.C. § 4-212(4).

<sup>72</sup>708 F.2d at 296-97 (Cudahy, J., dissenting).

<sup>73</sup>See, e.g., IND. CODE §§ 26-1-2-721, -7-403, -9-307 (1982 & Supp. 1983).

<sup>74</sup>IND. CODE § 26-1-2-316 (1982 & Supp. 1983).

<sup>75</sup>Act of Feb. 22, 1980, Pub. L. No. 167, § 1, 1980 Ind. Acts 1523, 1523-24 (codified at IND. CODE § 26-1-2-316 (1982)).

<sup>76</sup>IND. CODE § 26-1-2-316(3)(d) (1982).

Generally, under the UCC, this limitation of warranty could be achieved by use of a warranty disclaimer incorporated in the agreement between a buyer and a seller.<sup>77</sup> As a result, it is not entirely clear why it was necessary for sellers to press for this amendment. Moreover, since warranties are now limited by statute in Indiana, some buyers, who may believe that they are protected by the warranty of merchantability, will be surprised to find that they are not, even though these buyers have not agreed to any limitation or exclusion of the warranty of merchantability. This could have negative effects on small farmers who purchase livestock. Finally, since other states may not have this limitation on warranty, unnecessary questions concerning choice of law could be raised in sales involving more than one state.

The second amendment to UCC section 2-316 was enacted by the 1983 Indiana General Assembly as House Enrolled Act 1381.<sup>78</sup> This amendment was a part of a larger effort to address repair and express warranty service on audio or visual home entertainment products such as radios, televisions, and audio or video playback or recording devices.<sup>79</sup> In addition to these matters of express warranty and service, however, House Enrolled Act 1381 purported to add to UCC section 2-316 another method for limiting or excluding implied warranties. Indiana Code section 26-1-2-316(3)(e) now provides that:

with respect to a sale of audio or visual entertainment products . . . made as a result of a solicitation through a mail order catalog, it is sufficient to exclude all implied warranties in connection with the sale of any product in the catalog, if the contract is in writing and the language in the contract conspicuously states that: (i) the product is sold "as is" or "with all faults"; and (ii) the entire risk as to the quality and performance of the product is with the buyer.<sup>80</sup>

It is not completely clear why this amendment to the UCC was sought. Indiana Code section 26-1-2-316(3)(a) already provided that "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."<sup>81</sup> This language

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<sup>77</sup>All implied warranties may be disclaimed as long as certain formalities are observed to insure that the buyer willfully and knowingly gave up the protection of the warranties. See generally *Id.* § 26-1-2-316(2), (3) (Supp. 1983).

<sup>78</sup>Act of Apr. 7, 1983, Pub. L. No. 254-1983, § 1, 1983 Ind. Acts 1647, 1647-48 (codified as amended at IND. CODE § 26-1-2-316 (Supp. 1983)).

<sup>79</sup>This Act also created a new chapter on service for audio or visual entertainment products. IND. CODE §§ 26-2-6-1 to -7 (Supp. 1983).

<sup>80</sup>*Id.* § 26-2-316(3)(e).

<sup>81</sup>Some courts have held that this language must be conspicuous if found in a writing. See, e.g., *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. 31, 286 N.E.2d 188



seems to cover all the cases addressed in this new provision and, therefore, this special interest amendment does not appear to create any problems of nonuniformity under the UCC.

### *E. Consumer Law—Health Spa Services Act*

Contracts between consumers and organizations providing health, weight loss, and exercise facilities and services have generated an increasing volume of disputes in recent years. In an effort to address these disputes, regulate these contracts, and reduce consumer dissatisfaction, the 1983 Indiana General Assembly enacted the Health Spa Services Act.<sup>82</sup>

1. *Coverage of the New Law.*—The coverage of the new law is tied to the expression “health spa services,”<sup>83</sup> defined broadly to include

instruction, training, or assistance in physical culture, bodybuilding, exercising, reducing, figure development, or any other health spa service, for the use of the facilities of a health spa, figure salon, weight loss clinic, gymnasium, or other facility used for the delivery of health spa services, or for membership in any group, club, association, or organization formed to deliver health spa services.<sup>84</sup>

This definition appears to cover services provided by a wide range of organizations including some hospitals, athletic clubs, social clubs, and the YWCAs and YMCAs.

Non-profit social or athletic organizations do not seem to have been responsible for the type of activities and problems which are addressed in this new statute; and the drafters may have intended to exclude these organizations from coverage. The new statute defines “health spa” to include only those business entities which offer health spa services and to exclude those entities which are tax exempt under section 501 of the Internal Revenue Code.<sup>85</sup> Unfortunately, the definition of “health spa services” is not so limited and many provisions of the statute apply to anyone who delivers “health spa services” whether it is a “health spa” or another type of organization. Therefore, it may be that some non-profit organizations will have to examine the new law carefully to determine whether their activities involve health spa services and, if so, what steps they must take to comply with the new law.

2. *Formality Requirements and Documentation.*—Section 2 of the new statute provides that every contract for health spa services must be

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(1972). Since the language added by this amendment to UCC section 2-316(3) requires a writing and conspicuousness, no additional protection is provided by the new amendment.

<sup>82</sup>Act of Apr. 14, 1983, Pub. L. No. 249-1983, § 1, 1983 Ind. Acts 1632, 1632-37 (codified at IND. CODE §§ 24-5-7-1 to -18 (Supp. 1983)).

<sup>83</sup>IND. CODE § 24-5-7-1 (Supp. 1983).

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

in writing.<sup>86</sup> The most important sanction for failure to observe this formality is found in section 10 which provides that “[a] contract for health spa services that does not comply with this chapter is voidable at the option of the buyer.”<sup>87</sup> Although this formality requirement operates in a slightly different manner than the Statute of Frauds,<sup>88</sup> it seems to have the same purpose and effect. Section 2 of the new law also requires the entity providing health spa services to furnish the buyer with two forms of documentation: (1) a copy of the written contract and (2) an explanation of the buyer’s cancellation rights.<sup>89</sup>

3. *Cancellation Rights.*—The buyer of health spa services has two cancellation rights under the new statute. First, section 5 provides that every contract for health spa services must give the buyer the right to cancel any time before midnight of the third full business day after the buyer signs the contract.<sup>90</sup> This is similar to the three-day cooling-off right found in other statutes.<sup>91</sup> The buyer may exercise this cancellation right by “written notice, in any form, delivered in person or mailed by certified or registered mail to the seller at the address specified in the contract.”<sup>92</sup> This notice must be accompanied by the membership cards which were furnished to the buyer under the contract.<sup>93</sup> In the event of cancellation pursuant to this three-day cooling-off right all money paid pursuant to the contract is to be refunded within thirty days of receipt of the cancellation notice.<sup>94</sup>

Section 6 of the new law provides that every health spa services contract must state, in at least ten point boldface type, that the buyer or the buyer’s estate may cancel in four circumstances:

(1) The buyer dies. (2) The buyer becomes totally physically disabled for the duration of the contract. (3) The health spa facility operated by the seller is moved to a location that is more than five (5) miles from the original facility. (4) The services are no longer available as provided in the contract because of the seller’s permanent discontinuance of operation.<sup>95</sup>

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<sup>86</sup>*Id.* § 24-5-7-2.

<sup>87</sup>*Id.* § 24-5-7-10(a).

<sup>88</sup>For example, UCC § 2-201 prevents suits on contracts for sale of goods priced at more than \$500 unless there is either a writing or some other evidence of the existence of the contract. If it is admitted by the person against whom enforcement is sought that there is a contract, the Statute of Frauds barrier of UCC § 2-201 is eliminated. In contrast, the Health Spa Services Act makes any contract which is not in writing, even if admitted, voidable at the option of the buyer. IND. CODE § 24-5-7-10(a) (Supp. 1983).

<sup>89</sup>IND. CODE § 24-5-7-2 (Supp. 1983).

<sup>90</sup>*Id.* § 24-5-7-5(a).

<sup>91</sup>*See, e.g.,* UNIF. CONSUMER CREDIT CODE § 2.502(1), 7 U.L.A. 676 (Master ed. 1978).

<sup>92</sup>IND. CODE § 24-5-7-5(b) (Supp. 1983).

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* § 24-5-7-5(c).

<sup>95</sup>*Id.* § 24-5-7-6(a).

Section 7 of the statute sets forth procedures for determining the buyer's total physical disability.<sup>96</sup>

In the event of cancellation in one of these four circumstances, the buyer of health spa services is not entitled to a full refund; "[t]he seller may retain the portion of the total price representing the services used or completed plus reimbursement for the expenses incurred in an amount not to exceed twenty-five percent (25%) of the total contract price."<sup>97</sup> Apparently this means that if the buyer has used six months of a one-year contract, the provider of health spa services may retain one-half of the total price and, in addition, an amount as reimbursement for expenses incurred. It is not clear what items of expense are to be reimbursed under this formula. In any case, the claim for reimbursement may not exceed twenty-five percent of the total purchase price and the total amount due to the seller in the event of cancellation may not exceed the full contract price.<sup>98</sup>

4. *Terms to Protect Customers.*—The new law mandates various contract terms designed to protect customers. For example, no health spa services contract may require payments or financing by the buyer over a period in excess of thirty-six months from the date of the contract.<sup>99</sup> Moreover, the term of a health spa services contract "may not be measured by or be for the life of the buyer,"<sup>100</sup> and the term of the contract may not exceed three years from the date the contract was entered into, although the buyer may renew the contract for additional periods.<sup>101</sup> The new law also provides that "[a] contract for health spa services to be rendered at an existing health spa facility must provide that the performance of the agreed upon services is to begin within forty-five (45) days from the date that the contract was entered into."<sup>102</sup>

Where the services are to be provided at a planned spa facility or a spa facility under construction, the contract for health spa services is voidable at the option of the buyer if the health spa facility and the services are not available within twelve months from the date of execution of the contract.<sup>103</sup> In addition, where the services are to be provided at a facility to be completed in the future, the new law provides that a bond must be filed with the Secretary of State, issued by a surety company admitted to do business in Indiana, in an amount of \$25,000 or such greater amount as the Secretary of State may specify by rule.<sup>104</sup> Although

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<sup>96</sup>*Id.* § 24-5-7-7.

<sup>97</sup>*Id.* § 24-5-7-8(a).

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* § 24-5-7-3(a).

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* § 24-5-7-3(b).

<sup>102</sup>*Id.* § 24-5-7-4(a).

<sup>103</sup>*Id.* § 24-5-7-4(b).

<sup>104</sup>*Id.* § 24-5-7-13.

the State of Indiana is the obligee of the bond,<sup>105</sup> section 15 of the new law provides a procedure by which the Secretary of State may make awards from the bond to buyers who have sustained financial losses as a result of a breach of the health spa services contract.<sup>106</sup>

5. *Remedies.*—Under section 12 non of the statute's provisions may be waived; any effort to provide for waiver by agreement is void as contrary to public policy.<sup>107</sup> Subject to some cure opportunities which the service provider may invoke, any contract for health spa services that does not comply with the new law is voidable at the option of the buyer.<sup>108</sup> Finally, a seller who violates any provision of the new law commits a deceptive act that is actionable by the Attorney General or a buyer under the Indiana Deceptive Sales Practices Act,<sup>109</sup> and the seller may be subject to the penalties under that Act.<sup>110</sup>

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<sup>105</sup>*Id.* § 24-5-7-14(a).

<sup>106</sup>*Id.* § 24-5-7-15.

<sup>107</sup>*Id.* § 24-5-7-12.

<sup>108</sup>*Id.* § 24-5-7-10.

<sup>109</sup>IND. CODE §§ 24-5-0.5-1 to -9 (1982).

<sup>110</sup>*Id.* § 24-5-7-17 (Supp. 1983).



## XVII. Workers' Compensation

JORDAN H. LEIBMAN\*

### A. Introduction

The survey period was marked by several important decisions in workers' compensation law. The Indiana Supreme Court twice reversed expansive decisions rendered by the Indiana Court of Appeals,<sup>1</sup> but in two other cases, the supreme court liberalized previous holdings.<sup>2</sup> In other cases involving aggravated pre-existing medical conditions, the court of appeals upheld the Industrial Board's denial of total permanent disability awards where partial impairment compensation had already been awarded.<sup>3</sup> The court of appeals also clarified the meaning of "special employer" and "borrowed servant" for workers' compensation purposes,<sup>4</sup> and it applied new gloss to the dual concept of "injury arising out of and in the course of employment."<sup>5</sup> The court of appeals also reiterated that an employer can only be held liable for medical expenses of which it has notice.<sup>6</sup>

During the survey period, the court of appeals explored the difference between lienholder and subrogee status in the context of a third party action,<sup>7</sup> and in another third party case, the right to sue a fellow employee under "the same employ" rule was clarified.<sup>8</sup> The Industrial Board's power to determine "the fact" and "the acknowledgment of" paternity for the award of workers' compensation was also upheld by the court of appeals.<sup>9</sup>

During its 1983 session, the Indiana General Assembly raised several benefit ceilings under the Indiana Workmen's Compensation and Occupa-

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<sup>1</sup>See *infra* notes 12-47 and accompanying text ("dust disease" last exposure statute of limitation ruled constitutional), and notes 54-91 and accompanying text (college varsity athlete on athletic scholarship ruled not employee of university).

<sup>2</sup>See *infra* notes 103-21 and accompanying text (employer liable for nursing care after injury reaches permanent and quiescent state), and notes 154-66 and accompanying text (expert medical testimony need not be couched in terms of "reasonable medical certainty" for workers' compensation purposes).

<sup>3</sup>See *infra* notes 127-39 and accompanying text (permanent disability award after award for partial impairment requires showing of shattered wage earning capacity), and notes 140-53 and accompanying text (fact finder can reject expert testimony of disability when in conflict with other expert evidence although not from same type of medical specialist).

<sup>4</sup>See *infra* notes 92-102 and accompanying text.

<sup>5</sup>See *infra* notes 167-95 and accompanying text.

<sup>6</sup>See *infra* notes 196-210 and accompanying text.

<sup>7</sup>See *infra* notes 242-56 and accompanying text.

<sup>8</sup>See *infra* notes 257-66 and accompanying text.

<sup>9</sup>See *infra* notes 267-76 and accompanying text.

tional Diseases Acts,<sup>10</sup> and on the federal level, the Seventh Circuit Court of Appeals, in companion cases, denied "Black Lung" benefits to two claimants by approving evidence offered by the defendants to rebut the claimants' statutory pneumoconiosis presumptions.<sup>11</sup>

### B. Occupational Disease: "Last Exposure" Rules

In *Bunker v. National Gypsum Co.*,<sup>12</sup> the Indiana Supreme Court finally ended Richard Bunker's vigorous challenge to the Indiana statute of limitations which governs "dust disease"<sup>13</sup> claims arising under the Indiana Occupational Diseases Act.<sup>14</sup> The Act provides that "[n]o compensation shall be payable . . . in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust . . . three (3) years after the last day of the last exposure to the hazards of such disease."<sup>15</sup>

The claimant had been exposed to asbestos for a twenty-two month period in 1949-1950 while employed by National Gypsum.<sup>16</sup> He was transferred by the company to an asbestos-free environment in 1950, where he worked until he left National Gypsum in 1966.<sup>17</sup> In 1976, after undergoing exploratory surgery, Bunker was diagnosed as having asbestosis.<sup>18</sup> Although he was later able to return full-time to his job,<sup>19</sup> he filed a claim for disability under the "Indiana Workmen's Occupational Diseases Act."<sup>20</sup>

Bunker's claim for workers' compensation was denied by the Industrial Board on the ground that it was filed more than three years from the

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<sup>10</sup>See *infra* notes 277-81 and accompanying text.

<sup>11</sup>See *infra* notes 211-41 and accompanying text.

<sup>12</sup>441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

<sup>13</sup>Pneumoconiosis, silicosis, and asbestosis are frequently called the dust diseases because they are caused respectively by coal dust, silica dust, and asbestos dust. Victims of the dust diseases have three years to bring a claim whereas claimants suffering from other workplace toxins have only two. IND. CODE § 22-3-7-9(f) (1982).

<sup>14</sup>IND. CODE §§ 22-3-7-1 to -38 (1982 & Supp. 1983).

<sup>15</sup>*Id.* § 22-3-7-9(f) (1982). The supreme court quoted from the earlier version, IND. CODE ANN. § 22-3-7-9(e) (Burns 1974). 441 N.E.2d at 10. The language differences between the two versions are not significant.

<sup>16</sup>441 N.E.2d at 9-10.

<sup>17</sup>*Id.* at 10.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 16 (Hunter, J., dissenting).

<sup>20</sup>*Id.* at 9 (referring to IND. CODE §§ 22-3-7-1 to -38 (1982 & Supp. 1983)). Bunker also brought an action for common law negligence against National Gypsum. See *Bunker v. National Gypsum Co.*, 406 N.E.2d 1239 (Ind. Ct. App. 1980). See also Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 466-69 (1982). He argued he had such a claim because his exposure to asbestos antedated a 1963 amendment to the Indiana Workmen's Occupational Diseases Act which made it the exclusive remedy for employees seeking relief from their employers for health impairments caused by toxic agents found in the workplace. The court ruled that Bunker would have to seek his remedy under the Act. 406 N.E.2d at 1241.

date of his last exposure while an employee of National Gypsum.<sup>21</sup> Bunker responded that his exposure to asbestos fibers was a continuous one, because the asbestos dust remained in his lungs and gastro-intestinal system and was never excreted. Therefore, "the last day of the last exposure" had not yet arrived.<sup>22</sup> The Industrial Board rejected Bunker's interpretation of the statute by finding that "the legislature cannot be said to have intended the term 'last exposure' to mean other than 'last exposure' during and 'in the course of employment.'"<sup>23</sup> For Bunker, that "last exposure" would have been in 1950.

In so ruling, the Board rejected Bunker's argument that workers' compensation statutes must always be construed consistent with the humane objectives of the legislation.<sup>24</sup> Instead, the Industrial Board followed a purposive approach, stating that the legislature had intended a scheme which would provide relief for workplace accidents and health impairments which could be " 'currently funded out of reduced profits and/or increased price to the consumer of the product of [the] business. Without a specific reasonable time limitation, the rate making process locks [sic] the vital component of predictable losses until some other statistical pattern can be established.' "<sup>25</sup>

On appeal, Bunker argued that if the court were to hold that his claim was barred by the "last exposure" provision of the Act, that provision should be held to be unconstitutional on due process grounds.<sup>26</sup> The

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<sup>21</sup>441 N.E.2d at 9. The Indiana Workmen's Occupational Diseases Act grants the Industrial Board jurisdiction to administer the compensation provisions of the Act. IND. CODE § 22-3-1-3 (1982).

<sup>22</sup>See Brief for Appellant at 7, *Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind. Ct. App. 1981) [hereinafter cited as Appellant's Brief].

<sup>23</sup>*Id.* at 3 (quoting Award from Industrial Board of Indiana, Dec. 26, 1979).

<sup>24</sup>See F. MARSHALL, A. KING & V. BRIGGS, SR., *LABOR ECONOMICS* (4th ed. 1980). "The objective of these statutes was to assure benefits to workers and their families in the event of work-related injuries or death while, at the same time, limiting the actual liability of employers to the size of the worker compensation payment." *Id.* at 467.

References to the need for liberal construction of workers' compensation laws so as to effectuate their humane objectives are found in the following Indiana cases (other than *Bunker*) which were decided during the survey period: *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1172 (Ind. 1983); *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 28 (Ind. 1982); *Indiana Bell Tel. Co. v. Ernst*, 444 N.E.2d 1258, 1260 (Ind. Ct. App. 1983); *Suburban Ready Mix Concrete v. Zion*, 443 N.E.2d 1241, 1242 (Ind. Ct. App. 1983); *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 84 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983); *Goins v. Lott*, 435 N.E.2d 1002, 1006 (Ind. Ct. App. 1982).

<sup>25</sup>Appellant's Brief, *supra* note 22, at 3 (quoting Award from Industrial Board of Indiana, Dec. 26, 1979).

<sup>26</sup>Appellant's Brief, *supra* note 22, at 16-21. Bunker also raised two equal protection arguments. *Id.* at 21-28. With respect to the first, the court stated: "Nor could it be rationally urged that the legislature intended to divide exposed workers for purposes of coverage into those continually exposed for the necessary 20 to 30 year gestation period and those not." 426 N.E.2d at 425 n.7. The court did not address the second of the Act's classifications identified by Bunker as invidious—the distinction between radiation victims and dust disease victims. Under the Act, the former are given the benefit of a "discovery rule,"



Indiana Court of Appals held that the three year statute of limitations denied Bunker due process of law by effectively denying him a right to recovery.<sup>27</sup> The court cited medical studies which demonstrated that the symptoms of asbestosis were often first manifested many years after the victim's initial threshold exposure to asbestos.<sup>28</sup> The court concluded that "[i]n view of the discovery of this factual information about the disease since the legislature imposed the . . . limitation in 1937, it appears to us that the statute can no longer stand."<sup>29</sup>

As predicted in last year's Survey Article,<sup>30</sup> the Indiana Supreme Court reversed.<sup>31</sup> The court found two errors in the decision below. One was the court of appeals' use of "medical evidence found outside the record of this case to justify their opinion."<sup>32</sup> The second was the lower court's holding that the last exposure provision was unconstitutional.<sup>33</sup>

With respect to the court of appeals' independent search for medical evidence, the supreme court stated that appellate review of lower courts' factual findings "is limited to those matters contained in the record which were presented to and considered by the fact-finder."<sup>34</sup> With respect to the lower court's finding that the statute was violative of due process, the supreme court gave great weight to the presumption of constitutionality that must be accorded an act of the legislature, especially in the case of statutes of limitations where a judgment as to the reasonableness of the limitation period must be made.<sup>35</sup> The supreme court stated that "[t]he legislature has the sole duty and responsibility to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."<sup>36</sup> In upholding the statute, the supreme court explained that to do otherwise would frustrate the legislature's purpose of creating a limitations period for occupational disease claims and would be a "blatant abuse of judicial power."<sup>37</sup>

An interesting question is raised by the supreme court's analysis. The court reviewed the medical evidence cited by the court of appeals and

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while the latter frequently find themselves barred by the three year statute of limitations before they can possibly discover their illnesses. IND. CODE § 22-3-7-9(f) (1982).

<sup>27</sup>426 N.E.2d at 425.

<sup>28</sup>*Id.* at 424-25 & n.6.

<sup>29</sup>*Id.* at 425.

<sup>30</sup>See Coriden, *Workers' Compensation, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 433, 434 (1983).

<sup>31</sup>441 N.E.2d at 14.

<sup>32</sup>*Id.* at 11.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 14 (quoting *Hales & Hunter Co. v. Norfolk & W. Ry.*, 428 N.E.2d 1225, 1227 (Ind. 1981)).

<sup>35</sup>441 N.E.2d at 12.

<sup>36</sup>*Id.* The court of appeals apparently found the three year limitations period to be "manifestly insufficient."

<sup>37</sup>*Id.* at 13-14.

noted that the incidence of asbestosis appeared to be a function of exposure: the greater the exposure, the greater the chance of disease.<sup>38</sup> Because the respondent had been exposed for a period of only twenty-two months, the supreme court reasoned that “a legislator *standing in the past* may have reasonably concluded that Respondent would probably never be afflicted by asbestosis and therefore would probably never be in need of protection or relief.”<sup>39</sup> If, however, as the court of appeals found, later medical discoveries proved that the 1937 legislators had miscalculated the true probabilities of disease,<sup>40</sup> would the once constitutional statute become violative of due process in light of the new facts? The supreme court gave its answer: “It is within the duties and responsibilities of the legislature to keep itself advised of the general progress of medical learning and to make the determination as to whether or not new or revised legislation is needed.”<sup>41</sup>

The court failed to recognize the doctrine of judicial self-restraint in this case, according to Justice Hunter in dissent.<sup>42</sup> He argued that reaching the constitutional question was inappropriate in this case because “the record . . . [was] void of the development . . . vital to our resolution of constitutional issues.”<sup>43</sup> He would have preferred either a trial *de novo* on the constitutional issues,<sup>44</sup> or a holding that Bunker did not meet the statutory requirement of a “disablement” and therefore had no claim for compensation.<sup>45</sup> Although it was true that Bunker did return to full-time employment following exploratory surgery in 1976, he was totally disabled for a four week period at the time.<sup>46</sup> Given that Bunker had pressed the claim that he was disabled, to rule that his four week temporary total inability to earn wages was not a disablement under the Act could lead to serious injustice in other cases.<sup>47</sup>

The effect of the Indiana Supreme Court's ruling in *Bunker* was quickly felt. In *Woodworth v. Lilly Industrial Coatings, Inc.*,<sup>48</sup> the claimant had contracted leukemia which he alleged was caused by his exposure to carcinogenic agents while employed at Lilly. The date of claimant's last exposure was March 1, 1977, but he was not actually disabled until

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<sup>38</sup>*Id.* at 14.

<sup>39</sup>*Id.* (emphasis added).

<sup>40</sup>See *supra* note 29 and accompanying text.

<sup>41</sup>441 N.E.2d at 14.

<sup>42</sup>*Id.* at 14-15 (Hunter, J., dissenting).

<sup>43</sup>*Id.* at 17.

<sup>44</sup>*Id.* at 19.

<sup>45</sup>*Id.* at 15-18.

<sup>46</sup>Record of the Proceedings at 5, *Bunker v. Nat'l Gypsum Co.*, 426 N.E.2d 422 (Ind. Ct. App. 1980) (Industrial Board of Indiana, Form 9, claim for compensation “for total disability during exploratory surgery and post-operative recovery”), *rev'd*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 103 S. Ct. 1761 (1983).

<sup>47</sup>The United States Supreme Court dismissed Bunker's appeal for the lack of a federal question. *Bunker v. Nat'l Gypsum Co.*, 103 S. Ct. 1761 (1983).

<sup>48</sup>446 N.E.2d 646 (Ind. Ct. App. 1983).

about March, 1980.<sup>49</sup> In this case the limitation provision attacked by the claimant was the general two-year "last exposure" rule,<sup>50</sup> rather than the three-year period accorded "dust diseases."<sup>51</sup> Relying on the court of appeals' decision in *Bunker*, the claimant argued that the two-year limitation period was violative of due process.<sup>52</sup> Following the supreme court's reversal in *Bunker*, the court of appeals affirmed the Industrial Board's dismissal of the claim.<sup>53</sup>

### C. The Employer-Employee Relationship

1. *Athletic Scholarship*.—In order for there to be a compensable event, an employer-employee relationship between the claimant and the entity from which he or she is seeking workers' compensation must be found to exist.<sup>54</sup> Consistent with the policy that workers' compensation laws are to be liberally construed to effectuate the humane objectives of the legislation,<sup>55</sup> a measure of liberality is required in defining the term employee.<sup>56</sup> That there are limits to this process was demonstrated in the case of *Rensing v. Indiana State University Board of Trustees*.<sup>57</sup>

Claimant Rensing was a varsity football player at Indiana State University.<sup>58</sup> He incurred a spine injury during practice which left him a quadriplegic.<sup>59</sup> Rensing, prior to his matriculation at Indiana State, had entered into a scholarship agreement with the university trustees which he argued was equivalent to a "contract of employment."<sup>60</sup> In exchange for playing football, he was to receive a package consisting of financial assistance and other benefits.<sup>61</sup> The agreement provided that, if he were

<sup>49</sup>*Id.* at 647.

<sup>50</sup>IND. CODE § 22-3-7-9(f) (1982) provides in pertinent part: "No compensation shall be payable for or on account of any occupational diseases unless disablement . . . occurs within two (2) years after the last day of the last exposure to the hazards of the disease. . . ."

<sup>51</sup>*See supra* note 15 and accompanying text.

<sup>52</sup>446 N.E.2d at 647.

<sup>53</sup>*Id.* at 648. For a full discussion of *Bunker* see Leibman & Dworkin, *A Failure of Workers' Compensation and Tort: Bunker v. National Gypsum Co.*, 18 Val. U.L. Rev. (1984).

<sup>54</sup>IND. CODE § 22-3-2-2 (1982). *See* *Mid-Continent Petroleum Corp. v. Vicars*, 221 Ind. 387, 47 N.E.2d 972 (1943); *Meek v. Julian*, 219 Ind. 83, 36 N.E.2d 854 (1941); *Taylor v. Brainard*, 111 Ind. App. 265, 37 N.E.2d 714 (1941).

<sup>55</sup>*See supra* note 24.

<sup>56</sup>*Daniels v. Terminal Transp. Co.*, 125 Ind. App. 28, 32, 119 N.E.2d 554, 556 (1954). The Indiana Workmen's Compensation Act states: "The term 'employee' means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer." IND. CODE § 22-3-6-1(b) (1982).

<sup>57</sup>444 N.E.2d 1170 (Ind. 1983).

<sup>58</sup>*Id.* at 1170. For a summary of the details of the case, see *id.* at 1170-72.

<sup>59</sup>*Id.* at 1170.

<sup>60</sup>*Id.* at 1172.

<sup>61</sup>*Id.* at 1171.

injured, his financial assistance would continue, but he would still be obligated to provide services to the athletic department of the university.<sup>62</sup> The Industrial Board rejected his claim for workers' compensation, finding that he had failed to prove the existence of an employer-employee relationship between himself and the university trustees.<sup>63</sup>

The Indiana Court of Appeals reviewed the Industrial Board's award and in a 2-1 decision found sufficient evidence of an employment relationship between the parties within the meaning of the statute.<sup>64</sup> First, the court noted that it was conceded by the university trustees that some type of contractual relationship existed between them and Rensing.<sup>65</sup> After finding that Rensing was not covered by the classes of employees expressly exempted from coverage under the Indiana Worker's Compensation Act, the court addressed the question of whether there was an employment contract between the parties.<sup>66</sup> The court observed that the financial aid agreement called upon Rensing to play football in exchange for financial aid, or if injured, to provide alternative services.<sup>67</sup> Rensing's benefits were to continue as long as he "was 'otherwise eligible to compete.'"<sup>68</sup>

The court also observed that "scholarships or similar benefits may be viewed as pay pursuant to a 'contract of hire' in the analogous context of unemployment benefits."<sup>69</sup> The Unemployment Compensation Act provides for liability for contributions on behalf of individuals attending college " 'who, in lieu of remuneration . . . receive either meals, lodging, books, tuition or other education facilities.' "<sup>70</sup> In addition, the court found that the financial aid agreement impliedly gave the university trustees the power to withdraw benefits if it was later found that Rensing had misrepresented his intention to play football.<sup>71</sup>

The court, finding no Indiana cases on point, cited a California case in which the next of kin of a deceased scholarship athlete were awarded death benefits under the California workers' compensation law.<sup>72</sup> That athlete, however, also had a part-time job with the college.<sup>73</sup> In a Colorado case, a student-athlete was required to play football in exchange for a job as manager of the university's tennis courts.<sup>74</sup> When he was

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<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 1172.

<sup>64</sup>437 N.E.2d 84, 87 (Ind. Ct. App. 1982), *rev'd*, 444 N.E.2d 1170 (Ind. 1983).

<sup>65</sup>*Id.* at 83.

<sup>66</sup>*Id.* at 84.

<sup>67</sup>*Id.* at 85.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* (quoting IND. CODE § 22-4-6-2 (1982)).

<sup>71</sup>437 N.E.2d at 85.

<sup>72</sup>*Id.* at 86 (citing *Van Horn v. Industrial Accident Comm'n*, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963)).

<sup>73</sup>437 N.E.2d at 86.

<sup>74</sup>*Id.* at 87 (citing *University of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953)).

injured during football practice, the Colorado Supreme Court upheld his workers' compensation award. The court held that the injury was an incident of his employment.<sup>75</sup> In another Colorado case, however, the next of kin of a student-athlete who was on an athletic scholarship were denied compensation because the evidence failed to disclose an obligation on the athlete's part to play football.<sup>76</sup> The Indiana Court of Appeals concluded that in the two foreign cases in which compensation was awarded, as well as in the instant case, benefits received were conditioned upon "athletic ability and team participation."<sup>77</sup> Therefore, the court found a contract of hire existed and Rensing was an employee within the meaning of the Indiana statute.<sup>78</sup>

A final issue addressed by the court was whether Rensing's contract for hire should be classified as "casual and not in the usual course of the trade, business, occupation or profession of the employer."<sup>79</sup> Such a finding would remove Rensing from the statute's coverage. The court found Rensing's activities non-casual because of their periodical regularity and the importance of the athletic program to the university.<sup>80</sup> Finally, the court found football to be a part of the university's occupation.<sup>81</sup>

The Indiana Supreme Court granted transfer and reversed in a unanimous decision.<sup>82</sup> The court stated that for there to be an employment relationship, there must be "an intent that a contract of employment, either express or implied, . . . exist."<sup>83</sup> The court examined the documents which formed the agreement and found no such intent.

The primary document relied on by the court was the National Collegiate Athletic Association (NCAA) constitution and bylaws which the agreement incorporated by reference. The NCAA constitution expressly distinguishes intercollegiate sports from professional sports, viewing the former "as part of the educational system."<sup>84</sup> A student may not accept any pay, nor can an institution "condition financial aid on a student's ability as an athlete."<sup>85</sup> The benefits Rensing received under the grant were not considered pay under NCAA rules, nor did they affect his eligibility. The Internal Revenue Service has ruled that such benefits are not taxable and are to be treated in the same manner as an award under an academic scholarship.<sup>86</sup>

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<sup>75</sup>437 N.E.2d at 87.

<sup>76</sup>*Id.* (citing *State Compensation Ins. Fund v. Industrial Comm'n*, 135 Colo. 570, 314 P.2d 288 (1957)).

<sup>77</sup>437 N.E.2d at 87.

<sup>78</sup>*Id.* (referring to IND. CODE § 22-3-6-1(b) (1982)).

<sup>79</sup>437 N.E.2d at 87 (quoting IND. CODE § 22-3-6-1(b) (1982)).

<sup>80</sup>437 N.E.2d at 88-89.

<sup>81</sup>*Id.*

<sup>82</sup>444 N.E.2d at 1175.

<sup>83</sup>*Id.* at 1173.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

The court noted that the Indiana General Assembly has granted the boards of trustees of state educational institutions only the power to award scholarships that are "reasonably related to the educational purposes and objectives of the institution and in the best interests of the institution and the state."<sup>87</sup> No such requirement is placed on the hiring of part-time employees. Furthermore, unemployment benefit contributions are assessed not on scholarship grants, but only on in-kind benefits conferred on regular job holders in lieu of pay.<sup>88</sup>

The court also stated that the university's receipt of benefits from its athletic program did not mean that Rensing was in the service of the school.<sup>89</sup> Moreover, other jurisdictions have held that student leaders, student athletes, student resident-hall assistants and the like were not employees unless they were also employed in a university job.<sup>90</sup>

The court found three essential elements of an employment relationship lacking in the agreement between the university trustees and Rensing—the lack of intent to enter a contract for hire, the lack of pay for performance, and the lack of the employer's right to discharge on the basis of performance.<sup>91</sup> The decision of the Industrial Board was, therefore, reinstated.

2. *Borrowed Servant*.—In *Beach v. Owens-Corning Fiberglas Corp.*,<sup>92</sup> the plaintiff was a general employee of U.S. Piping but was working on the premises of Owens-Corning for a period of several months pursuant to a contract between the companies.<sup>93</sup> When Beach was injured on the job, he brought suit (presumably alleging negligence) against Owens-Corning. The defendant's motion for summary judgment was granted on the theory that the plaintiff was a borrowed servant, and any claim for relief against Owens-Corning had to be brought under the Indiana Workmen's Compensation Act.<sup>94</sup> The federal district court ruled that the question "whether plaintiff [was] an employee or independent contractor" was a matter of law and that summary judgment was appropriate.<sup>95</sup>

In applying a test of employer-employee relationship from *Fox v. Contract Beverage Packers, Inc.*,<sup>96</sup> the court found that

while Owens-Corning, (1) did not have the right to discharge Jackie Beach; (2) did not pay him his wages directly; (3) did not supply his tools; and (4) had no formal contract of employment

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<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 1173-74.

<sup>89</sup>*Id.* at 1174.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>542 F. Supp. 1328 (N.D. Ind. 1982).

<sup>93</sup>*Id.* at 1329-30.

<sup>94</sup>*Id.* at 1331.

<sup>95</sup>*Id.* at 1329 (citing *Downham v. Wagner*, 408 N.E.2d 606 (Ind. Ct. App. 1980)).

<sup>96</sup>398 N.E.2d 709 (Ind. Ct. App. 1980).

with plaintiff; it (1) did control the place and the manner in which plaintiff was performing his work; (2) did exercise direct supervision over him at the time of the accident; (3) did contract with U.S. Piping for his services . . . ; and (4) had the right to and did control the boundaries of his work.<sup>97</sup>

One additional factor from *Fox* was whether the parties believed that an employer-employee relationship existed.<sup>98</sup> Beach claimed that he held no belief that Owens-Corning was his employer.<sup>99</sup> The court found, however, the plaintiff's acquiescence in the direct supervision by Owens-Corning for a period of several months was sufficient to demonstrate an implied service contract between the parties.<sup>100</sup> The court stated that the decisive Indiana "test for the existence of a master-servant relationship is 'the right to command the act and to direct and control the means, manner or method of performance.'"<sup>101</sup> Thus, Owens-Corning, as a matter of law, was held to be a special employer of the plaintiff.<sup>102</sup>

#### D. *Permanent and Quiescent State*

1. *Permanent Impairment—Nursing Care.*—Workers' compensation includes two components: the first is compensation to victims for economic loss as a result of injuries arising out of and in the course of their employment; the second is compensation to injured employees to cover expenses they incur for medical services and supplies. Both of these compensation components are limited. Economic loss, whether as a result of disability (the inability to work and earn wages) or impairment (the loss of physical function),<sup>103</sup> is limited under the Indiana statute to a total of 500 weeks of compensation at a percentage of the average weekly wage.<sup>104</sup> Medical expense compensation is also limited, in theory at least, by the concept that the employer is not liable for medical costs once it is no longer possible "to limit or reduce the amount and extent of [the victim's] impairment."<sup>105</sup> That point may not be reached, however, even after the

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<sup>97</sup>542 F. Supp. at 1330.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* (quoting *Wabash Smelting, Inc. v. Murphy*, 134 Ind. App. 198, 209, 186 N.E.2d 586, 592 (1963)).

<sup>102</sup>542 F. Supp. at 1331.

<sup>103</sup>See *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 26 (Ind. 1982).

<sup>104</sup>IND. CODE § 22-3-3-8 (1982) provides for a maximum non-medical benefit amount set by a percent of an average weekly wage multiplied by 500. The maximum average weekly wage and maximum non-medical benefit limits are established by the Indiana Workmen's Compensation Act. *Id.* § 22-3-3-22 (1982 & Supp. 1983). These amounts for 1983 and beyond have recently been raised. See *infra* notes 277-80 and accompanying text.

<sup>105</sup>IND. CODE § 22-3-3-4 (1982). This section provides four time periods during which a claimant may be awarded expenses of medical and nursing services. *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 26 (Ind. 1982). The third period is "after an adjudication or award

victim's injury is said to be in a permanent and quiescent state. In *Talas v. Correct Piping Co.*,<sup>106</sup> the Indiana Supreme Court defined the scope of this statutory liability for medical expense compensation.

Woodrow Talas' industrial injury reduced him to a traumatic quadriplegic.<sup>107</sup> After hospitalization and a period of institutional rehabilitation, he was returned home where he received around-the-clock nursing care. The employer paid for the care for several months. The parties executed a Form 12 agreement which provided that after December 6, 1978, Talas "had sustained both '100% permanent impairment of the man as a whole and 100% total permanent disability.'" <sup>108</sup> This stipulation meant that Talas could receive the maximum compensation for his economic losses for the maximum period under the statute.<sup>109</sup>

With respect to medical expenses, the Form 12 agreement stipulated " 'that the injury is in a permanent and quiescent state.' " <sup>110</sup> However, it was also agreed " 'that the question of continuing treatment for the employee's injuries including . . . nursing services and supplies' " was to be " 'left to the determination of the Industrial Board upon proper hearing . . . .' " <sup>111</sup> Talas filed an emergency petition for an award for nursing care "as necessary to sustain and maintain his life."<sup>112</sup>

A single hearing officer ordered the employer to pay Talas for medical and nursing care necessary to reduce his impairment or disability.<sup>113</sup> Upon

of permanent impairment, as the industrial board may deem necessary to limit or reduce the amount and extent of impairment." This period was the only one held to be relevant to Talas' injuries. *Id.* at 27.

<sup>106</sup>435 N.E.2d 22 (Ind. 1982).

<sup>107</sup>For a review of facts of the *Talas* case, see *id.* at 23-26.

<sup>108</sup>*Id.* at 26 (quoting the parties' agreement). The court distinguished a finding of "100% permanent impairment of the man as a whole" from "permanent *total* impairment," the latter being a phrase which the court stated "would necessarily describe death." *Id.* at 27. The court, therefore, reasoned that the wording of the agreement must be read as "permanent partial impairment" which falls within the statutory period found applicable in this case. *Id.* See *infra* note 109.

<sup>109</sup>Compensation for permanent partial *impairment* is calculated by taking a percentage of an average weekly wage times a specified number of weeks. IND. CODE § 22-3-3-10 (1982). But a worker can also recover a total permanent disability award. *Id.* § 22-3-3-22 (1982 & Supp. 1983). It has been argued that under *Perez v. United States Steel Corp.*, 172 Ind. App. 242, 247, 359 N.E.2d 925, 929 (1977), *vacated*, 426 N.E.2d 29 (Ind. 1981) (not addressing this issue), an injured employee could be entitled to both types of awards. Coriden, *Compensation, Disability, Impairment*, INDIANA WORKMEN'S COMPENSATION 1983 § 11, at 8 (Indiana Continuing Legal Education Forum 1983). *But cf.* *Duncan v. George Moser Leather Co.*, 408 N.E.2d 1332, 1336 & n.5 (Ind. Ct. App. 1980) (citing *Perez* to support proposition that duplication of awards isn't permissible, but that IND. CODE § 22-3-3-27 (1982) permits the Industrial Board to modify or change a permanent partial impairment award to a permanent total disability award).

<sup>110</sup>435 N.E.2d at 24 (quoting the parties' agreement).

<sup>111</sup>435 N.E.2d at 24 (quoting the parties' agreement).

<sup>112</sup>435 N.E.2d at 24.

<sup>113</sup>*Id.*



appeal, the full Industrial Board overruled and directed that Talas receive none of the aid he had requested.<sup>114</sup> The Board's findings revealed conclusively that no additional medical or nursing care would improve Talas' condition.<sup>115</sup> However, evidence in the record was equally clear that around-the-clock care was essential to prevent his condition from seriously deteriorating.<sup>116</sup> The employer's position, which was adopted by the Industrial Board, was that " 'there was no medical treatment which was necessary to limit or reduce the amount and extent of Talas' impairment or disability and that the amount and extent of Talas' impairment would never be reduced.' " <sup>117</sup>

The supreme court adopted a broader view.<sup>118</sup> Although the supreme court agreed that nothing could be done to "limit or reduce the amount and extent" of Talas' quadriplegia, it found that he was unable to care for himself. The court found further that absent special care and assistance, Talas would be more susceptible to life threatening medical disorders.

In view of the remedial nature of the Workmen's Compensation Act and the liberal construction to be accorded it, we conclude that the impairment of Talas's physical functions would be limited, if not reduced, by nursing care, as these terms are utilized in the Act. That conclusion follows even though the care will not cure Talas's quadriplegia, *for in the circumstances present here*, any other construction would be inimical to the humanitarian purposes of the Act.<sup>119</sup>

The court stated its reasoning was limited to "*the circumstances present here*,"<sup>120</sup> yet it seems clear that its ruling will make Indiana employers generally liable for maintenance care necessary to keep an incurable injury at its permanent and quiescent state once that stage has been reached. The court also ruled that *professional* nursing care was not necessarily required if lay help would do, but a family member could not be required to give up gainful employment in order to provide that help.<sup>121</sup> One result of the *Talas* case is to bring Indiana more in line with other

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<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 27.

<sup>116</sup>*Id.* at 27-28.

<sup>117</sup>*Id.* at 25 (quoting Industrial Board's findings).

<sup>118</sup>Talas appealed, partly on the ground that the Industrial Board had failed to make adequate findings of fact. The Supreme Court of Indiana agreed, and twice remanded the case to the Industrial Board for further factual findings. *Id.* at 23. See *Talas v. Correct Piping Co.*, 426 N.E.2d 26 (Ind. 1981); *Talas v. Correct Piping Co.*, 416 N.E.2d 845 (Ind. 1981); see also Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 455-58 (1982).

<sup>119</sup>435 N.E.2d at 28-29 (emphasis in original). The court cites fifteen cases from other jurisdictions supporting its reasoning. *Id.* at 29 n.1.

<sup>120</sup>*Id.* at 29 (emphasis in original).

<sup>121</sup>*Id.* at 30.

jurisdictions which have substantially extended the limitations on workers' compensation awards for medical expenses.

2. *Partial Impairment—Total Disability.*—Until a workplace injury reaches a permanent and quiescent state, the Indiana Workmen's Compensation Act<sup>122</sup> provides for an award of temporary total disability compensation.<sup>123</sup> After the injury is adjudged to be permanent and quiescent, a determination of the extent of impairment is made and the claimant receives a statutory award to compensate for the loss of physical function represented by the impairment.<sup>124</sup> The statute provides for awards for a specified number of weeks of compensation for loss of parts of the body as well as similar awards for partial loss of bodily function which can be expressed as a percentage impairment.<sup>125</sup> A final determination is then made as to whether the claimant suffers permanent total disablement as a result of the impairment; that is, whether the claimant is capable of reasonable employment. When the claimant has been adjudged to be 100% permanently impaired, a finding of total disability generally follows as a matter of course, as was the case in *Talas*.<sup>126</sup> But where the claimant suffers partial impairment, the far more common case, the issue of permanent total disability is more difficult to resolve.

In *Hale v. Mossberg/Hubbard*,<sup>127</sup> the claimant, Hale, a female janitor, suffered a back injury for which she received temporary total disability compensation. On January 12, 1979, Hale's doctor expressed the opinion that the claimant's injuries had become permanent and quiescent.<sup>128</sup> Upon receiving additional medical testimony, the single hearing judge found that the claimant suffered a " 'permanent partial impairment of 22% of the body as a whole, apportioned 7% as pre-existing and 15% as a result of the industrial accident . . . . ' " <sup>129</sup> In conclusion, the Industrial Board found " 'insufficient evidence of permanent total disability . . . . The spinal fusion is an accepted medical treatment for the condition suffered and limits employment, but does not totally prevent similar factory work, where such is available . . . . ' " <sup>130</sup>

Upon review, the Indiana Court of Appeals affirmed.<sup>131</sup> To justify a finding of permanent total disability, the court stated that the claimant had the burden of demonstrating her inability to engage in employment

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<sup>122</sup>IND. CODE §§ 22-3-1-1 to -10-3 (1982 & Supp. 1983).

<sup>123</sup>*Id.* § 22-3-3-8 (1982).

<sup>124</sup>*Id.* § 22-3-3-10.

<sup>125</sup>*Id.* § 22-3-2-10(b)(6). This subsection provides: "In all other cases of permanent partial impairment, compensation proportionate to the degree of such permanent partial impairment, in the discretion of the Industrial Board, not exceeding five hundred (500) weeks."

<sup>126</sup>See *supra* note 109.

<sup>127</sup>432 N.E.2d 409 (Ind. Ct. App. 1981).

<sup>128</sup>*Id.* at 410.

<sup>129</sup>*Id.* at 411 (quoting Industrial Board's findings).

<sup>130</sup>432 N.E.2d at 411 (quoting Industrial Board's findings).

<sup>131</sup>432 N.E.2d at 410, 414.

of reasonable types.<sup>132</sup> An award for permanent total disability requires a showing of disability “ ‘which so destroys or shatters a workman’s wage earning capacities as to leave him unable to resume reasonable types of employment for the remainder of his life . . . . [T]otal permanent disability must be taken to require a greater incapacity than that produced by any of the other scheduled harms.’ ”<sup>133</sup> The Industrial Board had found that the employer was unable or unwilling to tender work within the current physical limitations of the claimant.<sup>134</sup> Hale pointed to that fact, to the evidence of her difficulty in obtaining employment elsewhere (once she admitted to prospective employers that she had had a spinal fusion), and to her lack of training, expertise, work experience and education to justify a finding of a permanent total disability.<sup>135</sup> The court found the evidence insufficient to prove “that the spinal fusion was considered so disabling that she could not obtain any reasonable employment.”<sup>136</sup> The essence of this holding is that compensation for the permanent harm caused by the accident, once the condition becomes permanent and quiescent, will generally come in the form of an impairment award.

The court of appeals found sufficient evidence in the record to support the Industrial Board’s finding of a 7% pre-existing impairment.<sup>137</sup> The effect of that ruling was to reduce her impairment award from 22% to 15%.<sup>138</sup> How and why this apportionment is made is discussed in the next section.<sup>139</sup>

### *E. Aggravation of Pre-existing Condition*

1. “*Apportionment*” Statute.—In *Rork v. Szabo Foods*,<sup>140</sup> the claimant alleged that as a result of a fall she experienced in April, 1977, she suffered a sprained ankle, injured vertebrae, and complications.<sup>141</sup> Rork also alleged that her attempts to return to work had failed because continuing pain prevented her from fulfilling her work duties.<sup>142</sup> The Industrial Board found that following the accident, the claimant suffered “ ‘a 20% permanent partial impairment of the body as a whole of which 10% is causally connected to the stipulated industrial accident.’ ”<sup>143</sup> The Board

<sup>132</sup>*Id.* at 413.

<sup>133</sup>*Id.* at 412 (quoting *White v. Woolery Stone Co.*, 181 Ind. App. 532, 534, 396 N.E.2d 137, 139 (1979) (quoting B. SMALL, WORKMAN’S COMPENSATION LAW OF INDIANA § 9.4, at 244 (1950))).

<sup>134</sup>432 N.E.2d at 411.

<sup>135</sup>*Id.* at 412.

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* at 413.

<sup>139</sup>See *infra* notes 140-65 and accompanying text.

<sup>140</sup>439 N.E.2d 1338 (Ind. 1982).

<sup>141</sup>*Id.* at 1339.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 1341 (quoting Industrial Board’s Additional Findings of Fact)

further found that the claimant had failed to establish her permanent total disability. The claimant appealed, arguing that her accident had caused greater than a 10% impairment, and that she had become permanently totally disabled.<sup>144</sup>

In addressing the degree of impairment argument, the court cited section 12 of the Indiana Workmen's Compensation Act, the "apportionment" statute.<sup>145</sup> That section provides that where a permanent injury increases or aggravates a pre-existing permanent injury, the Industrial Board must determine the extent of pre-accident impairment and the amount of additional permanent impairment caused by the accident, "and shall award compensation only for that part of such injury, or physical condition resulting from the subsequent permanent injury."<sup>146</sup> Although conflicting medical testimony appeared in the record, the court stated that it was not its prerogative to reweigh the evidence.<sup>147</sup> The Industrial Board's finding of a 10% impairment as a result of the aggravation to Rork's pre-existing condition was greater than one expert's estimate, but less than another's.<sup>148</sup> On these facts the court refused to disturb the Industrial Board's finding of a 10% impairment.<sup>149</sup>

In reviewing Rork's claim for total permanent disability, the court noted that the claimant has the burden of establishing such a finding by proving an inability to perform employment of reasonable types.<sup>150</sup> Reasonableness is to be assessed by the availability of opportunities and the claimant's physical and mental fitness.<sup>151</sup> Rork's claim was premised on the testimony of a neurologist. That doctor, on the basis of his estimate of the pain suffered by the claimant, found "that she suffers a '100% impairment and total disability which is likely to be a permanent total disability with respect to pursuing gainful employment.'"<sup>152</sup> The court rejected Rork's argument that her total permanent disability was conclusively established because this evidence was un rebutted by another neurologist. It stated that the fact finder may reject expert opinion testimony and noted that there was other contradictory expert medical testimony. Based on these facts and the lack of evidence demonstrating the unavailability of work opportunities for which Rork was suited, the court upheld the Industrial Board's finding that Rork did not suffer permanent total disability.<sup>153</sup>

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<sup>144</sup>*Id.*

<sup>145</sup>*Id.* at 1342 (citing IND. CODE § 22-3-3-12 (1982)).

<sup>146</sup>IND. CODE § 22-3-3-12 (1982).

<sup>147</sup>439 N.E.2d at 1342.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 1342-43.

<sup>150</sup>*Id.* at 1343 (quoting *Perez v. United States Steel Corp.*, 426 N.E.2d 29, 31 (Ind. 1981) (quoting *Perez v. United States Steel Corp.*, 172 Ind. App. 242, 245-46, 359 N.E.2d 925, 927-28 (1977))).

<sup>151</sup>439 N.E.2d at 1343.

<sup>152</sup>*Id.* (quoting testimony of Dr. Smith).

<sup>153</sup>*Id.*

2. *To a Reasonable Medical Certainty.*—In *Noblesville Casting Division of TRW, Inc. v. Prince*,<sup>154</sup> the claimant alleged that an industrial accident had aggravated an existing back condition. The Industrial Board affirmed the hearing officer's award of medical expenses, temporary total disability, and permanent partial impairment.<sup>155</sup> On review, the Indiana Court of Appeals reversed the award because the expert testimony failed to establish to a reasonable medical certainty that the claimant's injuries were caused by the accident.<sup>156</sup>

In an exhaustive analysis, the supreme court reversed,<sup>157</sup> stating: "We here reject the notion that the admissibility and probative value of medical testimony is dependent upon the expert witness's ability to state conclusions in terms of 'reasonable medical certainty . . . .'"<sup>158</sup> The court's ruling that expert medical testimony couched in terms of "possibility" could be probative is discussed elsewhere in this survey issue.<sup>159</sup> The practical result of the holding should be an easing of a claimant's burden of establishing impairment and disability, especially in complex medical cases where estimates have to be made of the additional amount of injury that has been added to a pre-existing injury. The problem is analogous to that in the adoption of comparative fault provisions where the fact finder must apportion fault between parties. Expert evidence couched in terms of probabilities or possibilities in both of these situations is likely to aid the fact finder.<sup>160</sup>

Because the court of appeals had held for the employer under the "reasonable medical certainty" analysis, it did not reach several additional issues raised in *Noblesville Casting*.<sup>161</sup> The supreme court, in light of its rejection of the reasonable medical certainty standard, addressed these additional issues.

First, the court held it was unnecessary for the Industrial Board to distinguish an "acceleration" of an existing degenerative condition from an "aggravation" of an existing quiescent one.<sup>162</sup> The court stated that where an industrial accident increases an existing impairment, the statute only requires the Industrial Board to determine " 'the extent of the aggravation or increase resulting from the subsequent permanent injury.' "<sup>163</sup>

<sup>154</sup>438 N.E.2d 722 (Ind. 1982).

<sup>155</sup>*Id.* at 725.

<sup>156</sup>424 N.E.2d 1055 (Ind. Ct. App. 1981), *rev'd and vacated*, 438 N.E.2d 722 (Ind. 1982).

<sup>157</sup>438 N.E.2d at 737. This was a 2-2 decision with two justices concurring in the result only. *Id.* (Pivarnik, J., concurring). Justice Pivarnik, in his concurring opinion, stated that expert opinions based solely on "possibilities" were of no probative value. *Id.* Justice DeBruler did not participate. *Id.*

<sup>158</sup>*Id.* at 726.

<sup>159</sup>For a further discussion of this ruling, see Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 211 (1984).

<sup>160</sup>438 N.E.2d at 731-32.

<sup>161</sup>*Id.* at 732.

<sup>162</sup>*Id.* at 734.

<sup>163</sup>*Id.* (quoting IND. CODE § 22-3-3-12 (1982)).

The court also rejected Noblesville Casting's argument that the Industrial Board was required to specify the "'nature' of the pre-existing back condition."<sup>164</sup>

Second, Noblesville Casting attacked the sufficiency of evidence to support several of the Industrial Board's findings of fact. The court reviewed these findings and the supporting evidence and concluded that none of the findings were based on evidence that was "devoid of probative value or that lacked a requisite quantum of legitimacy."<sup>165</sup> Other evidential issues dealing with hearsay and hypothetical questions were likewise resolved in favor of the claimant.<sup>166</sup>

#### *F. Arising Out of and In the Course of Employment*

Claimants for workers' compensation must prove not only an employer-employee relationship but also that their injuries arose out of *and* in the course of their employment.<sup>167</sup> Traditionally, these tests were considered separate and distinct.<sup>168</sup>

Generally stated, the rule seems to be that an accident arises out of the employment when there is a causal connection between it and the performance of some service of the employment. A causal connection is established when the accident is shown to have arisen out of a risk which a reasonable person might comprehend as incidental to the employment, or where the evidence shows an incidental connection between conditions under which the employee worked and his resulting injury or death. The phrase, in the course of, requires, on the other hand, some investigation into the work itself and the breadth of its grasp. The principal emphasis is upon the time and place elements, so that "in the course of" the employment might be taken to mean "during" the employment.<sup>169</sup>

Yet, as the three cases in this section will demonstrate, there is a close relationship between the two tests, and a finding of one element tends to create an inference that the other is present as well.

1. *Out of the Employment.*—In *Suburban Ready Mix Concrete v. Zion*,<sup>170</sup> the parties stipulated that the harm to Robert Zion occurred *within* the course of his employment as a cement truck driver for Suburban.<sup>171</sup>

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<sup>164</sup>438 N.E.2d at 735.

<sup>165</sup>*Id.* at 736.

<sup>166</sup>*Id.* at 737.

<sup>167</sup>See IND. CODE § 22-3-2-2 (1982).

<sup>168</sup>"The phrases 'out of' the employment and 'in the course of' the employment have separate meanings and both requirements must be fulfilled before compensation is awarded." *Olinger Constr. Co. v. Mosbey*, 427 N.E.2d 910, 912 (Ind. Ct. App. 1981).

<sup>169</sup>B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 6.1 (1950).

<sup>170</sup>443 N.E.2d 1241 (Ind. Ct. App. 1983).

<sup>171</sup>*Id.* at 1242.

The court of appeals addressed the issue of whether the injury arose *out of* his employment. Zion was accidentally, but fatally injured when a ricocheting bullet struck him in the head. The shot was fired by a minor who was shooting at street lights from his parents' apartment.<sup>172</sup> The court stated that "the crucial issue for determination [was] whether a causal connection exist[ed] between the accident and the employment. Absent such a connection, the injury is not deemed to have arisen out of the employment."<sup>173</sup>

The Industrial Board found for Zion, and the Indiana Court of Appeals affirmed. The court stated that the arising out of employment requirement is relaxed when a claimant's employment involves traveling.<sup>174</sup> The court cited a 1981 case in which a traveling employee was killed in a robbery at a motel near the construction site where he worked.<sup>175</sup> Even though the robbery in that case took place after working hours, the death was found to arise out of his employment because his job placed him at the point where the shooting occurred. In *Zion*, the court found that the claimant's employment required him to be at the site of the accident and held that such a finding supported the Industrial Board's conclusion that the accident arose out of Zion's employment.<sup>176</sup>

Indiana courts have ruled that employees who incur injury, even during working hours, by crossing highways and exposing themselves to danger no greater than would be experienced by the general public, cannot recover under the statute.<sup>177</sup> But when the employer condones the conduct, or makes it necessary, compensation is awarded.<sup>178</sup> Generally, parking lot accidents are compensable,<sup>179</sup> as are noon time injuries on the employer's premises.<sup>180</sup> Injuries to employees who leave the premises for lunch on their own time may result in denied compensation,<sup>181</sup> but traveling employees are generally protected throughout the day while away from home on the employer's business.<sup>182</sup> Innocent victims of horseplay and

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<sup>172</sup>*Id.*

<sup>173</sup>*Id.* (citing *Prater v. Indiana Briquetting Corp.*, 253 Ind. 83, 86, 251 N.E.2d 810, 812 (1969)).

<sup>174</sup>443 N.E.2d at 1242.

<sup>175</sup>*Id.* (citing *Olinger Constr. Co. v. Mosbey*, 427 N.E.2d 910 (Ind. Ct. App. 1981)).

<sup>176</sup>443 N.E.2d at 1243.

<sup>177</sup>See Pope, *Compensable and Non-Compensable Injuries Under the Indiana Workmen's Compensation Act*, INDIANA WORKMEN'S COMPENSATION 1983 § 1, at 31-32 (Indiana Continuing Legal Education Forum 1983) (citing *De Canales v. Dyer Constr. Co.*, 147 Ind. App. 537, 262 N.E.2d 543 (1970)).

<sup>178</sup>Pope, *supra* note 177, at 32 (citing *Prater v. Indiana Briquetting Corp.*, 253 Ind. 83, 251 N.E.2d 810 (1969)).

<sup>179</sup>Pope, *supra* note 177, at 27-28.

<sup>180</sup>*Id.* at 30-31.

<sup>181</sup>*Id.* at 30.

<sup>182</sup>*Id.* at 43-44.

assault during working hours also receive compensation.<sup>183</sup> In general, injuries that occur solidly *within* the course of employment are found to have an incidental causative nexus to the employment sufficient to support the additional finding that they arose *out of* the employment.

2. *In the Course of Employment.*—The injury in *Indiana Bell Telephone Co. v. Ernst*,<sup>184</sup> clearly arose *out of* the claimant's employment. Ernst was returning a company truck to the company garage when he was struck by another vehicle.<sup>185</sup> He was returning after completing a task assigned him by the company. Indiana Bell claimed that because the task was completed, and the accident occurred, after authorized working hours, the injury was not incurred *within* the course of the claimant's employment.<sup>186</sup>

The evidence as to authorization was in conflict, but the court ruled that "from the evidence there existed a reasonable inference that Ernst's assignment that day was to complete the two calls and return the truck to the garage."<sup>187</sup> The court suggested that the claimant may have worked overtime without authorization and may have taken too long to complete a job assignment, but held that when the accident occurred, he was within the course of his employment.<sup>188</sup>

When the risk that leads to the accident is created by the employment, i.e., it arises out of the employment, the accident is generally considered compensable, even in the face of the employee's alleged misconduct. Where there is no misconduct, the basis for compensability is even clearer, as when a cashier is mugged after working hours because the robbers believed—erroneously—that she carried the day's cash receipts.<sup>189</sup>

One final issue in *Ernst* is of interest. Although classifying the accident as a " 'non-job' incident," Bell paid Ernst \$343.50 per week for fourteen weeks and \$171.75 per week for thirty-nine weeks, and then terminated his employment.<sup>190</sup> The employer asked that this amount be credited against the workers' compensation award as a substitute system of insurance.<sup>191</sup> Because the company could not establish "whether Bell's sickness benefit plan complied with IC 22-3-5-4, whether it was intended to do so, or

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<sup>183</sup>*Id.* at 34-35 (citing *Woodlawn Cemetery Ass'n v. Graham*, 149 Ind. App. 431, 273 N.E.2d 546 (1971)).

<sup>184</sup>444 N.E.2d 1258 (Ind. Ct. App. 1983).

<sup>185</sup>*Id.* at 1259.

<sup>186</sup>*Id.* at 1260. Indiana Bell also claimed, on the same basis, that the injury did not arise out of Ernst's employment. *Id.* The court found that the injury did arise out of the claimant's employment "since such collisions are a reasonably foreseeable consequence of driving a company truck over the public highways." *Id.*

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>*See Strother v. Morrison Cafeteria*, 383 So. 2d 623 (Fla. 1980).

<sup>190</sup>444 N.E.2d at 1259.

<sup>191</sup>*Id.* at 1260-61.



whether it was ever submitted to or approved by the industrial board,"<sup>192</sup> no credit was permitted. While the Indiana Workmen's Compensation Act provides for self-insurance<sup>193</sup> and substitute insurance,<sup>194</sup> these plans must not only provide equivalent compensation, they must be approved as well.<sup>195</sup>

3. *Secondary to a Job Related Injury—Failure to Notify Employer of Personal Doctor.*—In *Richmond State Hospital v. Waldren*,<sup>196</sup> the ankle injury to the claimant arose both out of and in the course of her employment.<sup>197</sup> Later, when she was diagnosed as having phlebitis, Richmond Hospital contended that the phlebitis was not secondary to the ankle injury.<sup>198</sup> If it was, then the injury from phlebitis would also be found to have arisen both in the course of and out of her employment. The medical evidence was conflicting, but the Industrial Board affirmed the hearing judge's finding that the phlebitis was secondary to the ankle injury.<sup>199</sup> The Indiana Court of Appeals affirmed this finding.<sup>200</sup>

The claimant in this case sought medical assistance following the original accident from a doctor recommended by her attorney rather than the one recommended by her employer, Richmond Hospital.<sup>201</sup> Waldren failed to notify the hospital of the change. The phlebitis occurred several months later, after she had returned to work. She revisited the doctor her attorney had recommended, again without notifying her employer, and the doctor hospitalized her.<sup>202</sup> Two weeks after Waldren was hospitalized, the attorney sent notice of that fact to Richmond Hospital.<sup>203</sup>

The Industrial Board found that the employer had failed to tender medical care for the phlebitis, and due to that failure, claimant had good cause to seek medical treatment from another doctor. The Industrial Board awarded the claimant compensation for her medical expenses.<sup>204</sup>

The court of appeals severed and remanded the claim for medical expenses.<sup>205</sup> It stated that "the statute allows the employee to select medical treatment under three circumstances: (1) in an emergency; (2) if the

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<sup>192</sup>*Id.* at 1261.

<sup>193</sup>See IND. CODE §§ 22-3-5-1, -3 (1982); see also *id.* § 22-3-7-34(b) (Indiana Occupational Diseases Act).

<sup>194</sup>See IND. CODE § 22-3-5-4 (1982); see also *id.* § 22-3-7-34(e) (Indiana Occupational Diseases Act).

<sup>195</sup>"No such substitute system shall be approved unless it confers benefits upon injured employees . . . at least equivalent to the benefits provided by this act . . ." 444 N.E.2d at 1261 (quoting IND. CODE § 22-3-5-4 (1982)).

<sup>196</sup>446 N.E.2d 1333 (Ind. Ct. App. 1983).

<sup>197</sup>*Id.* at 1334.

<sup>198</sup>*Id.* at 1335.

<sup>199</sup>*Id.* at 1334-35.

<sup>200</sup>*Id.* at 1336.

<sup>201</sup>*Id.* at 1334.

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>*Id.* at 1334-35.

<sup>205</sup>*Id.* at 1336.

employer fails to provide needed medical care; or (3) for other good reason.”<sup>206</sup> The court found neither evidence of an emergency, nor evidence of good cause beyond the failure to provide medical care.<sup>207</sup> With respect to the employer’s failure to tender care, the court found “no evidence in the record that the Hospital had any knowledge of Waldren’s condition until June 27, 1980, fourteen days after she entered the Randolph County Hospital.”<sup>208</sup> The court held that an employer who “has no knowledge of the need for medical services and no opportunity to tender the medical services . . . cannot be held liable for them.”<sup>209</sup> On remand, Waldren was to be awarded only those medical expenses “incurred within a reasonable time after Richmond Hospital was notified of the need for such services.”<sup>210</sup>

### G. Federal Workers’ Compensation: Pneumoconiosis Presumption

1. *Rebuttal Evidence Standards.*—In 1977, Congress amended Title IV of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA), to liberalize claim awards and expand the Act’s coverage.<sup>211</sup> The Department of Labor, which is responsible for processing claims after 1973, has issued regulations defining pneumoconiosis, creating a presumption of the disease, and establishing standards for rebutting the presumption.<sup>212</sup> Those regulations were at issue in *Underhill v. Peabody Coal Co.*<sup>213</sup>

In *Underhill*, the claimant worked as a coal miner for thirty-four years.<sup>214</sup> Only the first nine years were in underground mines, but he claimed that throughout his career he was exposed to varying amounts of coal dust.<sup>215</sup> Underhill complained of “coughing, gagging, and dizziness, and . . . sleeping difficulties.”<sup>216</sup> He introduced as evidence two ventilatory studies of his respiratory function. His respiratory function was found, by each administering doctor, to register below the regulations’ minimum levels.<sup>217</sup> An administrative law judge (ALJ) found that Underhill had satisfied the regulatory criteria and “was therefore presumed to be totally disabled due to pneumoconiosis.”<sup>218</sup> The ALJ also rejected the evidence offered by Peabody to rebut the presumption.<sup>219</sup>

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<sup>206</sup>*Id.* (citing IND. CODE § 22-3-3-4 (1982)).

<sup>207</sup>446 N.E.2d at 1336.

<sup>208</sup>*Id.*

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>See *Underhill v. Peabody Coal Co.*, 687 F.2d 217, 219-20 (7th Cir. 1982).

<sup>212</sup>*Id.* at 219-20.

<sup>213</sup>687 F.2d 217 (7th Cir. 1982).

<sup>214</sup>*Id.* at 220.

<sup>215</sup>*Id.* at 221.

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*Id.* at 221-22.

The Benefits Review Board reversed,<sup>220</sup> and the Seventh Circuit Court of Appeals affirmed the decision of the Board, stating that "Peabody met its burden by offering in rebuttal uncontroverted medical evidence."<sup>221</sup> The court ruled that while the x-rays indicating that the claimant did not suffer from pneumoconiosis cannot, standing alone, rebut the presumption, they are of some probative value when combined with other evidence.<sup>222</sup> In this case, three physicians corroborated the x-ray evidence by testifying that Underhill's impaired respiratory function was not the result of pneumoconiosis. The court, relying on the uncontradicted medical opinion of only one of the physicians, found the ALJ's ruling unsupportable and irrational, and affirmed the Board's reversal.<sup>223</sup>

One of the physicians, not relied on by the court, found that Underhill's condition was *aggravated* by many years of underground coal mine employment.<sup>224</sup> Although the Benefits Review Board expressly disapproved the "aggravation theory," which is incorporated into Department of Labor regulations,<sup>225</sup> the court declined to rule on the concept. The court reasoned that because its disposition of the case was based on evidence which precluded "any finding that Underhill's lung impairment was aggravated by exposure to coal dust," it would be inappropriate for the court to reach the "important constitutional problem" of the aggravation theory.<sup>226</sup>

The court also held that, inasmuch as the pneumoconiosis presumption could be established by a physician's reasoned medical judgment, the standard for rebuttal should be no higher.<sup>227</sup> It was, therefore, improper for the ALJ to require a reasonable degree of medical certainty standard from the defendants.<sup>228</sup>

2. *Disablement Presumption After Death of Miner.*—In *Freeman v. Director of Workers' Compensation*,<sup>229</sup> the claimant widow sought benefits under a statutory presumption of entitlement. Under federal law, survivors of miners, who had been employed for twenty-five years or more in coal mines before June 30, 1971 and who died on or before March 1, 1978, are entitled to benefits unless it is established that at the time of death the miner was not partially or totally disabled by pneumoconiosis.<sup>230</sup>

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<sup>220</sup>*Id.* at 222.

<sup>221</sup>*Id.*

<sup>222</sup>*Id.* at 223.

<sup>223</sup>*Id.* at 223 & n.9.

<sup>224</sup>*Id.* at 222.

<sup>225</sup>20 C.F.R. § 727.202 (1982) states in pertinent part: "For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, *or aggravated by*, dust exposure in coal mine employment." (emphasis added).

<sup>226</sup>687 F.2d at 224.

<sup>227</sup>*Id.* at 223.

<sup>228</sup>*Id.*

<sup>229</sup>687 F.2d 214 (7th Cir. 1982).

<sup>230</sup>*Id.* at 215. See 30 U.S.C. § 921(C) (1976 & Supp. V 1981).

The claimant's late husband, Freeman, was employed as a miner for thirty years and as a mine examiner for the eight years prior to his death.<sup>231</sup> An ALJ ruled that Freeman's employer had failed to establish that Freeman was not " 'disabled by pneumoconiosis from engaging in work which was comparable to the most arduous employment in which he engaged with some regularity and over a substantial period of time during his career as a coal miner.' " <sup>232</sup> In reversing, the Benefits Review Board found that a total or partial disability depends upon a miner's decreased ability to carry out his last, not his most difficult, coal mine job.<sup>233</sup> The Board also ruled that evidence of more than one of the criteria promulgated in the regulation for rebuttal<sup>234</sup> was sufficient to rebut the pneumoconiosis presumption.<sup>235</sup>

On appeal the claimant challenged the Board's interpretation of the meaning of the rebuttal regulation.<sup>236</sup> That regulation lists four criteria and states that "alone" they are not sufficient to rebut the presumption.<sup>237</sup> The claimant urged the court of appeals to read the regulation as requiring evidence other than those four types.<sup>238</sup> The court looked to the language of a related permanent regulation in interpreting the rebuttal regulation.<sup>239</sup> The court found that while the rebuttal regulation was intended to keep claimants from being easily defeated by one piece of evidence, each criterion had probative force.<sup>240</sup> In finding at least three of the criteria present in the employer's rebuttal evidence, the court of appeals affirmed the Board's decision that the pneumoconiosis presumption had been rebutted.<sup>241</sup>

### H. Third-Party Actions

1. *Product Liability Interface—Lienholder v. Subrogee.*—In *Norris v. United States Fidelity & Guaranty Co.*,<sup>242</sup> Norris was injured on the job by a rock crushing machine. He recovered a workers' compensation award, paid by his employer's insurance carrier (Fidelity).<sup>243</sup> He then sued

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<sup>231</sup>687 F.2d at 215.

<sup>232</sup>*Id.* at 215-16 (quoting ALJ's findings).

<sup>233</sup>687 F.2d at 216.

<sup>234</sup>20 C.F.R. § 727.204(d) (1983).

<sup>235</sup>687 F.2d at 216.

<sup>236</sup>*Id.*

<sup>237</sup>*Id.* at 215. 20 C.F.R. § 727.204(d) (1983) reads as follows:

The following evidence alone shall not be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death; (2) Evidence pertaining to a deceased miner's level of earnings prior to death; (3) A chest X-ray interpreted as negative for the existence of pneumoconiosis; (4) A death certificate which makes no mention of pneumoconiosis.

<sup>238</sup>687 F.2d at 216.

<sup>239</sup>*Id.* at 217 (citing 20 C.F.R. § 718.306(d) (1983)).

<sup>240</sup>687 F.2d at 217.

<sup>241</sup>*Id.*

<sup>242</sup>436 N.E.2d 1191 (Ind. Ct. App. 1982).

<sup>243</sup>*Id.* at 1192.

the manufacturer of the machine in a third-party products liability action, and settled before trial for an amount less than his original claim.<sup>244</sup> Finally, Norris brought a declaratory judgment action to determine the extent of his liability to Fidelity. The declaratory judgment action was dismissed by the trial court, and the dismissal was affirmed by the Indiana Court of Appeals.<sup>245</sup>

Norris argued that the carrier's claim against him amounted to "equitable subrogation," and therefore Fidelity should not be allowed to recover because Norris did not recover the full value of his claim. Alternatively, Norris claimed that the carrier's recovery from the settlement should be reduced in the same proportion that his settlement had been reduced when compared with the amount of the original claim.<sup>246</sup> The court of appeals ruled that when an employee brings an action against a third-party tortfeasor, any recovery the employee receives by judgment or settlement establishes a lien in favor of the employer's compensation carrier under the Indiana Workmen's Compensation Act.<sup>247</sup> If, on the other hand, the employee's action is dismissed, or the employee fails altogether to bring the third-party claim, the carrier can bring an action in its own name or in the name of the claimant. The court found that in the latter two instances there is a subrogation which does not exist when the carrier is foreclosed from bringing suit by the employee's successful independent action.<sup>248</sup> Thus, Fidelity was a lienholder, not a subrogee. The court also rejected Norris's claim for a proportionate reduction in Fidelity's recovery, finding that he received what he bargained for and that to hold otherwise could allow injured employees to prevent recovery by compensation carriers.<sup>249</sup>

The plaintiff also argued that "as equitable subrogation should be applied, the doctrines of equitable discretion should also apply to bar repayment where the employer has 'unclean hands' because of its own negligence."<sup>250</sup> The court rejected this argument because subrogation didn't apply in this case. The court, in support of its conclusion, quoted from an Article coauthored by this writer.<sup>251</sup> That Article examined a provision of the Indiana Product Liability Act<sup>252</sup> which bars recovery of compensation payments made by employers and their carriers when the employer is adjudged to be a concurrent misuser of the defective product.<sup>253</sup>

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<sup>244</sup>*Id.* at 1194.

<sup>245</sup>*Id.* at 1192, 1195.

<sup>246</sup>*Id.* at 1193.

<sup>247</sup>*Id.* at 1194. See IND. CODE § 22-3-2-13 (1982).

<sup>248</sup>436 N.E.2d at 1193.

<sup>249</sup>*Id.* at 1194.

<sup>250</sup>*Id.*

<sup>251</sup>*Id.* at 1194-95 (quoting from Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227 (1979)).

<sup>252</sup>IND. CODE §§ 33-1-1.5-1 to -8 (1982 & Supp. 1983).

<sup>253</sup>Vargo & Leibman, *supra* note 251, at 247-48 (discussing IND. CODE § 33-1-1.5-4(b)(2) (1982)).

Although the Article predicted that the provision might not apply in situations where the carrier is a lienholder,<sup>254</sup> the authors were not at all sure that the legislature really intended the statutory bar against recovery back by a misusing employer to be inoperative in this class of cases. Because there seemed to be no policy basis for an exclusion, we thought the effect may have merely been a legislative oversight. It also seems clear that this provision of the Indiana Product Liability Act<sup>255</sup> was designed to more equitably apportion the cost of the employee's injury between a negligent employer and a defective workplace product manufacturer, without affecting the total recovery of the plaintiff/claimant.<sup>256</sup> In this case, Norris bargained for a settlement with the machine manufacturer for the full value of his injury and should not have expected an additional windfall recovery.

2. *Tort Action by State Employee Against Another State Employee.*

—In *State v. Coffman*,<sup>257</sup> claimant Coffman was an employee of the Indiana State Highway Department. He was injured in a collision with Kirk, an Indiana State Police Officer. Coffman received workers' compensation, but also filed a tort action against Kirk and the state.<sup>258</sup> The Indiana Workmen's Compensation Act allows such a suit against a person legally liable for an employee's injuries when that liability rests "in some other person than the employer and not in the same employ."<sup>259</sup> Coffman argued that although he and Kirk had the same employer, the State of Indiana, they were not "in the same employ" under the test articulated in *Ward v. Tillman*.<sup>260</sup> If that were true, Kirk would not be a fellow employee and Coffman would not be precluded from bringing a tort ac-

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<sup>254</sup>Indiana Code section 33-1-1.5-4(b)(2), however, refers only to cases where the employer or the carrier has sought recovery either as subrogee or direct claimant.

<sup>255</sup>IND. CODE § 33-1-1.5-4(b)(2) (1982) (amended 1983).

<sup>256</sup>Assume, for example, that Norris had won a judgment for \$1,000,000 from the manufacturer of the defective rock crushing machine, and it also could be shown that his employer had concurrently misused the machine by speeding it up or by failing to maintain it adequately. The *policy* behind section 33-1-1.5-4(b)(2) would dictate that the employer, because of its negligence, should lose its right to recover its compensation payments, but that policy should not go so far as to permit Norris to obtain a double recovery. Logically, the \$1,000,000 judgment against the product manufacturer should be reduced by the amount of the previously made worker's compensation payments. But because this section addresses only instances where the employee and carrier are claimants or subrogees, the misusing employer would appear to escape the pinch of the provision when the employer's status is that of lienholder. The policy of section 33-1-1.5-4(b)(2) seems directed at inhibiting the misuse by employers of workplace products, and would appear to be just as applicable to lienholder cases as it is to cases involving direct claims and subrogation. This section was amended in 1983 to apply to claimants and *lienholders*. For a discussion of this amendment, see Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 279 (1984).

<sup>257</sup>446 N.E.2d 611 (Ind. Ct. App. 1983).

<sup>258</sup>*Id.* at 613.

<sup>259</sup>*Id.* (quoting IND. CODE § 22-3-2-13 (1982)).

<sup>260</sup>179 Ind. App. 626, 386 N.E.2d 1003 (1979).

tion against him and the state under the Indiana Tort Claims Act.<sup>261</sup>

Coffman argued that the test from *Tillman* of "in the same employ" is whether the co-employee could recover workers' compensation from the same accident.<sup>262</sup> Kirk, a state police officer, was ineligible for workers' compensation because state troopers have their own disability fund.<sup>263</sup>

The court of appeals reversed the trial court's denial of summary judgment for the state. It noted at the outset that the state was Coffman's employer. Because the Indiana Workmen's Compensation Act precludes a suit against the employer, the court found that "Coffman [was] conclusively prevented from bringing a legal action against the State."<sup>264</sup> The court also found that Coffman was barred from suing Kirk in the police officer's individual capacity. The state, by statute, must pay a judgment " 'against an employee when the act or omission causing the loss is within the scope of his employment.' " <sup>265</sup> The court concluded that because a judgment against the police officer would create legal liability in Coffman's employer, the state, Coffman was also precluded from suing Kirk.<sup>266</sup>

### I. Miscellaneous

1. *Worker's Compensation Benefits to Illegitimate Children.*—In *Goins v. Lott*,<sup>267</sup> the Indiana Court of Appeals affirmed the Industrial Board's decision to award death benefits to an acknowledged illegitimate child of an Indiana workman killed in an industrial accident. The mother of the decedent's legitimate child, who also received benefits, opposed the award absent any court decree of paternity.<sup>268</sup> The sole issue on review was whether the Industrial Board was empowered to make a determination of paternity and acknowledgment in order to establish presumptive dependency.<sup>269</sup>

For the illegitimate child to be eligible for benefits, both an acknowledgment of paternity and a legal duty of the parent to provide support at the time of the parent's death must be shown.<sup>270</sup> The court found that the Industrial Board has the power to determine paternity where necessary "to a determination of dependency for benefit purposes."<sup>271</sup> The court then found that "the *fact* of paternity gives rise under Indiana law to the duty of a father to support his illegitimate child . . . ."<sup>272</sup>

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<sup>261</sup>IND. CODE §§ 34-4-16.5-1 to -19 (1982 & Supp. 1983).

<sup>262</sup>446 N.E.2d at 614.

<sup>263</sup>*Id.*

<sup>264</sup>*Id.*

<sup>265</sup>*Id.* (quoting IND. CODE § 34-4-16.5-5 (1982)).

<sup>266</sup>446 N.E.2d at 614.

<sup>267</sup>435 N.E.2d 1002 (Ind. Ct. App. 1982).

<sup>268</sup>*Id.* at 1003.

<sup>269</sup>*Id.* at 1005.

<sup>270</sup>*Id.* at 1006. See IND. CODE § 22-3-3-19 (1982).

<sup>271</sup>435 N.E.2d at 1007.

<sup>272</sup>*Id.* (emphasis in original).

Therefore, if a factual determination of paternity and acknowledgment is made, the illegitimate child is entitled to benefits under the act.<sup>273</sup>

The mother of the legitimate child also argued that the father did not have a legally enforceable obligation to support the illegitimate child at the time of his death because no paternity action had been brought within two years of the illegitimate child's birth.<sup>274</sup> Such an action is barred by the statute of limitations after two years.<sup>275</sup> Assuming *arguendo* that the statute of limitations applied in this case, the court found that by providing substantial economic and emotional support to the illegitimate child, the father had created a legally enforceable obligation on his part at the time of his death.<sup>276</sup>

2. *Statutory Update.*—The average weekly wage provisions under the Indiana Workmen's Compensation Act and the Indiana Occupational Diseases Act were amended during the survey period. Employees injured on or after July 1, 1983, and before July 1, 1984, are considered to have earned an average weekly wage of not more than \$234.00, and not less than \$75.00.<sup>277</sup> For employees injured on or after July 1, 1984, the average weekly wage is considered to be not more than \$249.00, and not less than \$75.00.<sup>278</sup> The total non-medical benefits for a worker's injury occurring within the July 1, 1983 through June 30, 1984 period were raised from \$70,000 to \$78,000,<sup>279</sup> and for the period on or after July 1, 1984, the cap on non-medical benefits was set at \$83,000.<sup>280</sup> Similar adjustments were made for occupational diseases.<sup>281</sup>

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<sup>273</sup>*Id.* at 1008.

<sup>274</sup>*Id.* at 1010.

<sup>275</sup>IND. CODE § 31-6-6.1-6 (1982).

<sup>276</sup>435 N.E.2d at 1010.

<sup>277</sup>Act of Apr. 22, 1983, Pub. L. No. 225-1983, § 2, 1983 Ind. Acts 1419, 1421 (codified at IND. CODE § 22-3-3-22 (Supp. 1983)).

<sup>278</sup>*See* IND. CODE § 22-3-3-22 (Supp. 1983).

<sup>279</sup>*Id.*

<sup>280</sup>*Id.*

<sup>281</sup>Act of Ap. 22, 1983, Pub. L. No. 225-1983, § 4, 1983 Ind. Act 1419, 1424-29 (codified at IND. CODE § 22-3-7-19 (Supp. 1983)).



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